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HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

No. 385.

OCTOBER TERM, 1955.

DUNN BROS., INC., *Appellant*,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION, REVIVED AS ALEX McKEIGNEY, CHAIRMAN OF STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

JURISDICTIONAL STATEMENT.

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Supreme Court of the State of Mississippi dated the 13th day of June, 1955, reversing a judgment of the Circuit Court of the First Judicial District of Hinds County, Mississippi, and from the judgment of the Supreme Court of Mississippi dated the 15th day of July, 1955, overruling the Suggestion of Error filed by this appellant, and hereby submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal, and that a substantial question is presented.

OPINIONS DELIVERED IN THE COURTS BELOW.

The opinions rendered by the courts below consist of the following: The opinion of the Supreme Court of the State of Mississippi rendered on the 13th day of June, 1955, reported in 80 So. 2d 802; the opinion of the Supreme Court of the State of Mississippi rendered on the 15th day of July, 1955, and not yet reported; the undated opinion of the Circuit Court of the First Judicial District of Hinds County, Mississippi, rendered during the November, 1954, term of said Court, which opinion is not reported. Copies of all of these opinions and of the judgments rendered pursuant thereto are attached hereto as Appendix A.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

This suit was filed by appellant pursuant to Sections 10123 and 10124 of the Mississippi Code of 1942, Annotated, which sections provide that any person improperly charged with any tax imposed by the General Sales Tax Law of the State of Mississippi, and required to pay the same, may recover the amount paid, together with interest, in any proper action or suit against the Commissioner. The basis of the suit was that, as applied to the activities of appellant, which were solely and exclusively in interstate commerce, the Mississippi Sales Tax Law violated the Commerce Clause of the Federal Constitution (Article I Section 8, Clause 3). The judgments sought to be reviewed are the judgments of the Supreme Court of the State of Mississippi dated and entered on the 13th day of June, 1955, reversing the judgment of the Circuit Court of the First Judicial District of Hinds County, Mississippi, and the judgment of the Supreme Court of the State of Mississippi

dated and entered on the 15th day of July, 1955, overruling the Suggestion of Error filed by Dunn Bros., Inc. The notice of appeal was filed in the Supreme Court of the State of Mississippi on the 9th day of August, 1955.

The statute conferring on this Court jurisdiction of this appeal is *28 U. S. C., Section 1257 (2)*.

The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgments on direct appeal in this case:

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239; *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265, 66 L. Ed. 227; *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277, 66 L. Ed. 234; *Memphis Steam Laundry Cleaner, Inc.*, v. *Stone*, 342 U. S. 389, 96 L. Ed. 436, 72 S. Ct. 424; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396; *Railway Express Co.* v. *Virginia*, 347 U. S. 359, 98 L. Ed. 757, 74 S. Ct. 558.

STATUTES INVOLVED.

The validity of the General Sales Tax Law of the State of Mississippi, being *Chapter 3 of Title 40 of Mississippi Code of 1942, Annotated*, insofar as same has been applied to the operations of appellant, is involved in this appeal. The chapter is quite lengthy, and, therefore, pursuant to the Rules of this Court, the entire General Sales Tax Law of the State of Mississippi is set forth in Appendix B hereto.

The provisions of said General Sales Tax Law that are specifically involved in this appeal are as follows:

Section 10105, Mississippi Code of 1942 Annotated:

"Tax levied.—There is hereby levied and shall be collected annual privilege taxes, measured by the amount or volume of business done, against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values, or gross income, or gross proceeds of sales, as the case may be, as follows (see sections following):"

Section 10109, Mississippi Code of 1942, Annotated:

"Upon every person engaging or continuing within this state in the business of operating an express business, transporting freight or passengers from one point to another in this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business.

* * * * * * *

"Upon every person engaging or continuing within this state in the business of operating motor vehicles on the public highways of this state for the transportation of persons or property for compensation or hire, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two percent of the gross income of the business; but such tax shall not apply to persons engaged in transporting school children under contract with counties or school districts.

"There shall be excepted from the gross income used in determining the measure of the tax imposed in this section so much thereof as is derived from the business conducted in commerce between this state and other states of the United States, or between this state and foreign countries which the state of Mississippi is prohibited from taxing under the Constitution of the United States of America. And nothing con-

tained in this section shall be construed to levy a tax upon the operation by municipal corporations of any electric, gas or water system owned by the municipality operating it."

Section 10126, Mississippi Code of 1942, Annotated:

"Is additional tax—remittances—how made.—The tax imposed by this Act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder, except as in this Act otherwise specifically provides. But no municipality or levee district shall be authorized to levy any tax by virtue of the provisions of this Act."

QUESTIONS PRESENTED.

The following questions are presented by this appeal:

Is the Commerce Clause (U. S. Constitution, Article I, Section 8, Clause 3) infringed by the Mississippi Sales Tax Law (Sections 10103-10140, Mississippi Code of 1942), which, as applied to Dunn Bros., Inc., the appellant, imposes a privilege tax upon the privilege of carrying on that portion of an interstate motor carrier's business consisting of receiving certain pipe from railroads at various points in Mississippi, which had been shipped from California, and continuing the transportation of such pipe to other points in Mississippi (designated as rights-of-way)? The agreed statement of facts covering the operations involved provides "it was the intent of the shipper at all times that the pipe be transported by common carrier from the point of manufacture outside of Mississippi to the pipe line right-of-way within Mississippi," and, as a matter of fact, the pipe was so transported from California to the rights-of-way in Mississippi "by the most direct route available,"

and the agreed statement of facts further provides that "from the time the pipe left the manufacturer in California until the pipe arrived at the rights-of-way, the pipe was at all times under the care and supervision of the aforementioned common carriers, either the railroad or the plaintiff."

Are the operations of the motor carrier described above exclusively in interstate commerce?

If the operations of said motor carrier are exclusively in interstate commerce, may the State of Mississippi lawfully impose a privilege tax for the privilege of carrying on such activities?

STATEMENT OF THE CASE.

This is a suit filed by Dunn Bros., Inc., pursuant to *Sections 10123 and 10124 of the Mississippi Code of 1942, Annotated,* as amended, for the recovery of privilege taxes paid to the State of Mississippi.

Under Section 10109 of the Mississippi Code of 1942, Annotated, as amended (being a part of the General Sales Tax Law of the State of Mississippi), Dunn Bros., Inc., was charged with a privilege tax in the amount of $557.93, and was required to pay the same by the State Tax Commission of the State of Mississippi. The tax in this amount was for the period from March, 1951, the date when the operations were begun, until May 31, 1951, which was the end of the fiscal year of the taxpayer. Thereafter, Dunn Bros., Inc., filed suit in the Circuit Court of the First Judicial District of Hinds County, Mississippi, seeking a refund of this sum, plus interest. Responsive pleadings were filed by A. H. Stone, Chairman, State Tax Commission. The parties to the suit agreed to a Stipulation of

Facts, which was filed with the Circuit Court, and the case was tried on the pleadings and this Agreed Statement of Facts, without a jury. The Circuit Court rendered a written opinion to the effect that the activities of Dunn Bros., Inc., which were taxed by the State of Mississippi, were solely and exclusively in interstate commerce—that the tax levied was admittedly a privilege tax—that the State of Mississippi was prohibited by the Commerce Clause of the Federal Constitution from placing a privilege tax upon the privilege of engaging in interstate commerce, and ordered a refund of the tax paid plus interest.

The Chairman of the State Tax Commission appealed from this decision to the Supreme Court of the State of Mississippi, which rendered an opinion and judgment reversing the decision of the Circuit Court of Hinds County, Mississippi, and holding; first, that the activities of the appellant were conducted in intrastate commerce, and, second, that even if such activities were not in fact intrastate commerce, nevertheless such activities were subject to the privilege tax in question.

The facts of the case were all set forth in an Agreed Statement of Facts, which appears in the record at pages 54 through 61.

The background of this suit is essentially as hereinafter stated:

Tennessee Gas Transmission Company was the owner of a large interstate pipe line, running through several states. That company desired to put an extension to this pipe line and purchased the necessary pipe from foundries in the State of California. The said Transmission Company was then confronted with the problem of transporting the pipe from California to its right-of-way in the various states

through which the extension was to run. Due to the tremendous mileage of the haul, it was wholly impractical to transport this pipe by truck from California to its right-of-way in the states involved. The company decided, therefore, to have the pipe hauled as far as practical by rail and then complete the haul by truck. Certificated common carriers were to be used for the entire haul. Under the tariffs filed by the various carriers, it was impossible to obtain a through bill of lading from the foundry in California to the right-of-way of the company, and it, therefore, became necessary for the Tennessee Gas Transmission Company to use separate bills of lading for the railroad portion of the haul and the truck portion of the haul. Before turning this pipe over to the railroad in California, Tennessee Gas Transmission Company had made the necessary arrangements with Dunn Bros., Inc., a certificated common carrier, by motor truck, to continue the transporting of this pipe to the ultimate destination, which was the right-of-way of Tennessee Gas Transmission Company.

Dunn Bros., Inc., is a Texas corporation operating in a number of states as a common carrier by motor vehicle under certificates of convenience and necessity issued by the Interstate Commerce Commission.

The title to the pipe was in Tennessee Gas Transmission Company before it ever left California, and the company was simply attempting to get the pipe that it had acquired to its right-of-way, so that it could be then used in the construction of its pipe line extension. At the end of the railroad portion of the journey, a representative of the Tennessee Gas Transmission Company and a representative of Dunn Bros., Inc., would check the pipe while it was still on the rail cars, "for the purpose of ascertaining the condition of the pipe, and to see if the pipe had suffered any

damage in transit, or to determine whether any of the pipe had been lost in transit." (R. 59). This was done because there was no through bill of lading and, therefore, the benefits of the Carmack Amendment to the Interstate Commerce Act (49 U. S. C., Sec. 20 (11)), were not available to Tennessee Gas Transmission Company. That is to say, it could not hold the delivering carrier (Dunn Bros., Inc.) responsible for loss or damage which occurred during the railroad portion of the journey, or *vice versa*. Therefore, it needed to know which particular carrier was responsible for any damage or loss that occurred while the pipe was in transit.

Dunn Bros., Inc., would then take possession of the pipe while it was still on the railroad cars, unload the pipe from the rail cars into its trucks, and complete the transporting of the pipe to the right-of-way of Tennessee Gas Transmission, charging for its services in accordance with its tariff on file with the Interstate Commerce Commission.

It was stipulated in the Agreed Statement of Facts that "from the time the pipe left the manufacturer in California until the pipe arrived at the right-of-way, the pipe was at all times under the care and supervision of the aforementioned common carriers, either railroad or the plaintiff." (R. 59).

It was further stipulated in the agreed statement of facts as follows:

> "It was the intent and purpose of Tennessee Gas Transmission Company in originally ordering the shipment from the steel companies located outside of the State of Mississippi for all of said pipe to be transported from the point of manufacture directly to the pipe line right-of-way within the State of Mississippi, by the most direct route available. The various railheads within

> the State of Mississippi to which the pipe moved via railroads were never intended by the Tennessee Gas Transmission Company to be the ultimate destination of the pipe, but, on the contrary, it was the intent of the shipper at all times that the pipe be transported by common carriers from the point of manufacture outside of Mississippi to the pipe line right-of-way within Mississippi." (R. 58).

In performing its portion of the transportation service to be rendered, it was necessary for Dunn Bros., Inc., to haul the pipe from the end of the railroad portion of the journey to the right-of-way of Tennessee Gas Transmission Company. In some instances, the pipe was hauled by Dunn Bros., Inc., across state lines. In other instances, the pipe was hauled from the railroad to the right-of-way with both points being in the State of Mississippi. The State of Mississippi conceded that the portions of this haul where Dunn Bros., Inc., actually crossed the state line were interstate commerce and not subject to the tax demanded and collected. On the other hand, the State of Mississippi contended that as to that hauling which was done wholly within the State; that is, where the trucking carrier received the pipe from the railroad at a location within the State of Mississippi and delivered it to Tennessee Gas Transmission Company at a point on the right-of-way which was also within the State of Mississippi, such was intrastate commerce and liable for the tax collected. The State of Mississippi also contended, and the Supreme Court of Mississippi has now held, that even though these activities might be solely and exclusively in interstate commerce that, nevertheless, the State of Mississippi had the right to levy and has actually levied a tax upon the privilege of conducting these operations and that such tax does not violate the Commerce Clause of the Federal Constitution.

HOW THE FEDERAL QUESTION WAS PRESENTED.

The federal question as to the constitutionality of the application of the General Sales Tax Law of the State of Mississippi to the operations of Dunn Bros., Inc., was raised at the very outset of this matter. It was alleged in the declaration filed by Dunn Bros., Inc., in the Circuit Court of the First Judicial District of Hinds County, Mississippi. In the declaration it is alleged that the Chairman of the State Tax Commission of the State of Mississippi, erroneously assessed the plaintiff, Dunn Bros., Inc., with additional taxes; that Dunn Bros., Inc., was engaged solely and exclusively in interstate commerce in the State of Mississippi, operating under certificates granted by the Interstate Commerce Commission, and that the transportation sought to be taxed was "rendered solely in interstate commerce." (R. 7).

In its declaration Dunn Bros., Inc., then alleged as follows:

> "That under the Constitution of the United States of America, the privilege of conducting such operations is not subject to state taxation and more particularly, to the Mississippi Sales Tax Law." (R. 7).

The State of Mississippi, through the Chairman of its State Tax Commission, then filed a demurrer which was overruled, and then filed its answer putting at issue the exact constitutional question presented to this Court; that is, were these activities solely and exclusively in interstate commerce and if so, can the State of Mississippi levy a privilege tax upon the privilege of engaging in these activities?

These questions were presented orally and by brief to the Circuit Judge of the Circuit Court of the First Judicial

District of Hinds County, Mississippi, and in the opinion of that Court appears the following statement:

> "The taxes were paid under and by virtue of Section 10109, Mississippi Code of 1942, which levies sales tax upon every person engaged in business of transporting freight or passengers from one point to another in this state. Dunn Bros. claimed their business was interstate and foreign commerce and under the protection of the Commerce Clause of the Constitution they were not liable for payment of the tax, which is admittedly a privilege tax." (R. 62).

The Circuit Judge then went on in his opinion to hold that the activities were wholly in interstate commerce, and that the Commerce Clause of the Federal Constitution prohibited the State of Mississippi from levying a tax upon the privilege of engaging therein.

These same questions were raised by the Assignment of Error filed by the Chairman of the State Tax Commission, as appears in the record of this case. These exact questions were argued by brief and orally before the Supreme Court of the State of Mississippi, and the opinion of the Supreme Court of Mississippi rendered on the merits of the case deals entirely and exclusively with these constitutional questions. We again presented these questions to the Supreme Court of the State of Mississippi through the Suggestion of Error, which is also a part of the record in this case. The Supreme Court of the State of Mississippi then gave additional consideration to the constitutional question and reaffirmed its prior decision (R. 75, 93).

Thus it is clear the constitutional question was raised at the very outset of this matter and has been raised and pressed at every step of the proceedings.

THE QUESTIONS ARE SUBSTANTIAL.

This appeal presents another variation in the "seemingly endless problems raised by efforts of the several states to tax commerce as it moves among them." *Railway Express Agency* v. *Virginia*, 347 U. S. 359, 98 L. Ed. 757, 74 S. Ct. 558.

The Mississippi Supreme Court, in this case, made two definite holdings:

1. That the activities of Dunn Bros., Inc., were in intrastate commerce, and that, therefore, Dunn Bros., Inc., must pay the privilege taxes levied upon such activities;

2. That even if the activities of Dunn Bros., Inc., were solely and exclusively in interstate commerce, nevertheless, Dunn Bros., Inc., must pay the privilege tax as a recompense for the benefit and protection which the State afforded to Dunn Bros., Inc., while it was engaged in these activities.

With reference to the first holding of the Mississippi Supreme Court we point out the following:

It is well established by the decisions of this Court that "the essential character of the movement" is the decisive factor in determining whether transportation constitutes interstate or intrastate commerce. It has also been established by the decisions of this Court that the form of the bill of lading or contract of carriage is not conclusive as to the character of the transportation, but that the intent of the shipper is the predominant factor to be considered.

Baltimore & O. S. W. R. Co. v. *Settle*, 260 U. S. 166, 171, 67 L. Ed. 189, 192.

U. S. v. *Erie Railroad Company*, 280 U. S. 98, 101, 102, 74 L. Ed. 187, 206.

Annotations, 60 A. L. R. 1465; 155 A. L. R. 936.

In the case of *Baltimore & Ohio Railroad Co.* v. *Settle*, 260 U. S. 166, 171, 67 L. Ed. 189, 192, this Court stated as follows:

> "For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence or absence of one or all of these incidents may be important evidence bearing upon that question. *But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic.*"

It is also the law, established by decisions of this Court, that simply because a portion of the transportation involved takes place wholly within a single state and the carrier is disconnected from any other transportation system, this in itself does not make the commerce intrastate; but that where the commodity being transported is destined for or received from places outside the state, then the movement within the state is a part of the interstate movement where the "essential character of the movement" is interstate.

The Daniel Ball, 10 Wall. (77 U. S.) 557, 19 L. Ed. 999.

Norfolk & Western R. Co. v. *Pennsylvania*, 136 U. S. 114, 118, 119, 34 L. Ed. 394, 397.

Baer Bros. Mercantile Co. v. *Denver & Rio Grande R. R. Co.*, 233 U. S. 479, 490, 58 L. Ed. 1055, 1062.

Annotation, 74 L. Ed. 192.

In the present case the intent of the shipper is not in issue. The agreed Statement of Facts expressly provides that "it was the intent of the shipper at all times that the pipe be transported by common carriers from the point of manufacture outside Mississippi to the pipe line right-of-way within Mississippi" (R. 58), and that "from the time the pipe left the manufacturer in California until the pipe arrived at the right-of-way, the pipe was at all times under the care and supervision of the aforementioned common carriers, either railroad or the plaintiff." (R. 59). The "essential character of the movement" is, therefore, set forth in clear and unmistakable terms in the Agreed Statement of Facts.

The Mississippi Supreme Court, in an obvious effort to circumvent the facts as set forth in the agreement between the parties as to the "essential character of the movement," made statements concerning the facts in its original opinion which directly contradict the Agreed Statement of Facts. The effect of the decision of the Mississippi Supreme Court is to make the issuance of two bills of lading *absolutely controlling* in determining whether the transportation was interstate or intrastate, and this, in spite of the fact that this Court has held such to be "without legal significance" where the intent is clear. The intent of the parties is stipulated, and any effort by the Supreme Court of the State of Mississippi to draw inferences of other intent is taking a position directly contrary to the facts as stipulated by the parties.

The Mississippi Supreme Court apparently realized that this holding, which was in flagrant conflict with the decisions of this Court, would not stand. It undertook to bolster this obviously erroneous holding and proceeded further to hold that even though the activities taxed were

solely and exclusively in interstate commerce, nevertheless the same were subject to the privilege tax imposed.

Certainly there can be no question but that this ruling of the Mississippi Supreme Court brings this case within the jurisdiction of this Court by way of appeal.

Under the provisions of *28 U. S. C., Section 1257 (2)*, this Court has jurisdiction on appeal where there is drawn in question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity. The validity of a state statute is said to have been sustained within the meaning of this statute when the state court holds the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds. Thus where the court holds that a particular transaction is intrastate rather than interstate commerce, and that on such basis the state statute may be applied and enforced, the validity of the statute has been sustained as to those facts.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239.

Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265, 66 L. Ed. 227.

United Fuel Gas Co. v. *Hallanan*, 257 U. S. 277, 66 L. Ed. 234.

With reference to the second holding of the Mississippi Supreme Court we state as follows:

This Court has repeatedly held that a state cannot place a privilege tax directly upon operations which are exclusively and entirely in interstate commerce, and that to do so is a violation of the Commerce Clause of the Federal Constitution. The Mississippi Supreme Court paid lip-service to this fundamental principle when it stated in its original opinion as follows:

> "The federal courts have repeatedly held that state taxes cannot be collected upon the privilege of carrying on a business that is exclusively interstate in character." (R. 78).

Yet, the Mississippi Supreme Court in the same opinion holds that unless the record shows that the interstate operator has actually paid other taxes to the state, then the state can levy and collect a privilege tax upon the privilege of carrying on an interstate business. In other words, the Supreme Court of Mississippi recognizes the rule and then proceeds to ignore it. The effect of this holding is that the Commerce Clause of the Federal Constitution does not mean what it says, *unless* the record shows that the interstate carrier pays other and additional taxes to the state involved.

It was thought that the Mississippi Supreme Court could not possibly be intentionally making such a decision, and, accordingly, a Suggestion of Error was filed with that court pointing out this obvious and flagrant disregard of the Federal Constitution and the many decisions of this Court. The Suggestion of Error was considered and the Mississippi Supreme Court reiterated and reaffirmed its holding in this regard. The intent of that court is clear. The holding is simply that the Commerce Clause of the Federal Constitution does not prohibit the imposition of a privilege tax on interstate commerce where no showing is made that the interstate carrier has paid other taxes to the State of Mississippi.

There is no question but that the tax here involved is a privilege tax levied directly upon an interstate carrier for the privilege of conducting its operations. The statute imposing the tax is clear and positive. It provides "there is hereby levied and shall be collected annual privilege taxes * * * on account of the business activities * * *."

Section 10105, Mississippi Code of 1942, Annotated. The statute then goes on to provide "the tax imposed by this Act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder * * *." *Section 10126, Mississippi Code of 1942, Annotated.*

This decision of the Mississippi Supreme Court is in direct and flagrant violation of the decisions handed down by this Court in the cases of *Spector Motor Service, Inc.*, v. *O'Connor*, 340 U. S. 602, 95 L. Ed. 573; *Memphis Steam Laundry Cleaner, Inc.*, v. *Stone*, 342 U. S. 389, 96 L. Ed. 436, 72 S. Ct. 424; *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396; *Railway Express Agency* v. *Virginia*, 347 U. S. 359, 98 L. Ed. 757, 74 S. Ct. 558, and many other decisions that could be cited.

In addition, if this opinion is left standing, it will mean that the state courts have found a way to circumvent and to make almost meaningless the Commerce Clause of the Federal Constitution. If this opinion is left standing, then privilege taxes can be imposed directly upon the privilege of engaging in interstate commerce by the various states, unless it is shown that the states are paid other taxes. Many questions then present themselves. Who is to determine what other taxes are to be paid? Who is to determine how much other taxes are to be paid?

The effect of such a ruling upon the economy of this nation is apparent. A new principle of constitutional law will have been established, to-wit, that the privilege of engaging in interstate commerce may be taxed by a state. We do not feel that further elaboration as to the importance of this principle is necessary or would be proper.

The only reason given by the Mississippi Supreme Court to support its holding is that the record does not

show that Dunn Bros., Inc., paid taxes to the State of Mississippi for the benefits and protection that Dunn Bros., Inc., received while it was operating in interstate commerce in the State of Mississippi. This does not justify the imposition of a privilege tax directly upon the privilege of engaging in interstate commerce. Benefits and protection afforded by a state to an interstate carrier are relevant only to show that the essential requirements of due process have been met sufficiently to justify the imposition of *any* tax on the interstate activity. These facts are not material in determining the validity of a specific privilege tax under the Commerce Clause. This has been clearly and unmistakably held by this Court in the case of *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U. S. 157, 163, 164, 98 L. Ed. 583, 590. The requirement of due process is one question; the question of conflict with the Commerce Clause of the Federal Constitution is an entirely different question.

There is no magic in the phrase relied upon by the Mississippi Supreme Court to the effect that interstate commerce must be made to pay its way. As pointed out by this Court in the *Spector case*, 340 U. S. 602, 608, 95 L. Ed. 573, 578, "the question whether a state may validly make interstate commerce pay its way depends *first of all upon the constitutional channel through which it attempts to do so.*" A privilege tax placed directly upon activities which are exclusively in interstate commerce is an unconstitutional channel. The mere fact that the same number of dollars might have been exacted in a constitutional way, cannot legalize a direct privilege tax on interstate commerce.

There are many other reasons why this case is of extreme importance. We realize that the amount of money involved is not of paramount concern to this Court; how-

ever, there is a very large amount of money involved. The tax involved in this case covers only a short period of time, but if this decision of the Mississippi Supreme Court is upheld, then Dunn Bros., Inc., and all of the other carriers will be called upon immediately for vast amounts of privilege taxes for other periods of time.

Still another reason why this case is of importance is the fact that the Mississippi Supreme Court apparently placed considerable reliance upon the undecisive case of *Interstate Oil Pipeline Company* v. *Stone*, 337 U. S. 662, 93 L. Ed. 1613. This Court has held in several recent cases that the decision rendered in the Interstate Oil Pipeline Company case did not authorize the imposition of a privilege tax directly upon interstate commerce. However, there is apparently still confusion in the minds of the members of the Mississippi Supreme Court concerning the holding in that case as to what constitutes interstate commerce. It is submitted, therefore, that the present case illustrates the need for clarification and explanation of the Interstate Pipeline Company case insofar as it discusses the question of interstate commerce as distinguished from intrastate commerce.

Another reason why such significance is being attached to this decision of the Mississippi Supreme Court is that it will place interstate carriers in an impossible position. The Interstate Commerce Commission has held with reference to the identical situation involved in this case, with the identical carrier being involved, that operations of the type here involved are in interstate commerce, and that a Certificate of Public Convenience and Necessity from the Interstate Commerce Commission must be held before this transportation service can be rendered. *Dunn Contract Carrier Application*, 28 M. C. C. 476. On the other hand, the Mississippi Supreme Court has now

held that these activities are in intrastate commerce. Is it necessary for Dunn Bros., Inc., and all other such carriers in this nation now to begin making applications to each of the forty-eight states for intrastate authority to perform this transportation service? The entire industry is vitally affected by this holding of the Mississippi Supreme Court, and it is vitally important that this Court establish the applicable rules under which carriers can operate.

It is submitted that, for all of the foregoing reasons, the questions are of public importance and so substantial as to require plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,

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APPENDIX A.

IN THE SUPREME COURT OF MISSISSIPPI

No. 39,731

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION,
Revived as ALEX McKEIGNEY, CHAIRMAN OF

STATE TAX COMMISSION
VS.
DUNN BROTHERS, INC.

LEE, JUSTICE:

This is an appeal by A. H. Stone, Chairman of the State Tax Commission, from a judgment of the circuit court of the First Judicial District of Hinds County, requiring him to refund to Dunn Bros., Inc., the sum of $557.93.

The controversy arose in this way: The tax commission demanded of Dunn Bros., Inc., the payment of $557.93, being a sales tax of two percent on its gross income of $27,896.45, from its operation entirely within the State of Mississippi. The corporation paid the assessment, under protest, and then brought this action to recover, with the above mentioned result.

After the case reached this Court, A. H. Stone died; and Alex McKeigney has succeeded to the office, and the cause has been revived in his name.

The statutes under which this tax was demanded and collected are Sections 10,105 and 10,109, Code of 1942. Section 10,105 is as follows: "There is hereby levied and shall be collected annual privilege taxes, measured by the amount or volume of business done, against the persons,

on account of the business activities, and in the amounts to be determined by the application of rates against values, or gross income, or gross proceeds of sales, as the case may be, as follows:"

The applicable part of Section 10,109 is as follows: "Upon every person engaging or continuing within this state in the business of operating an express business, transporting freight or passengers from one point to another in this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business. * * * There shall be excepted from the gross income used in determining the measure of the tax imposed in this section so much thereof as is derived from the business conducted in commerce between this state and other states of the United States."

The cause was tried upon an agreed statement of facts in substance as follows: During the year 1951, Tennessee Gas Transmission Company was constructing an extension to its pipe line, which crossed several states, including the State of Mississippi. It purchased the necessary pipe for this purpose from a foundry in the State of California, and desired to have the same delivered by common carriers on its right of way in Mississippi. To effectuate this purpose, it made arrangements with a railroad company to deliver the pipe from the foundry to certain depots, or railheads, in the State of Mississippi, as near to its right of way as was feasible. It also engaged Dunn Bros., Inc., a Texas Corporation, holding a certificate of public convenience and necessity for interstate and foreign commerce from the Interstate Commerce Commission, but without such certificate from the Mississippi Public Service Commission for intrastate commerce in the State of Mississippi, to deliver the pipe, by motor truck, from the

depots or railheads in Mississippi to its right of way and string the same along the said right of way. The Transmission Company, as consignor, shipped the pipe by railroad to itself as consignee to the several depots or railheads in Mississippi. Bills of lading were issued accordingly. The delivering railroad did not, of course, parallel the Transmission Company's right of way. The Transmission Company paid freight thereon; and when a shipment arrived at its rail destination, one of the Transmission Company's agents inspected and accepted the same. Dunn Brothers then took charge of the shipment, and after giving a receipt to the railroad company for and on behalf of the Transmission Company as both consignor and consignee, unloaded the car and delivered the pipe along the right of way, for which service the Transmission Company paid them. In the agreed statement of facts, Dunn Brothers said that the purpose of the inspection by an agent of the Transmission Company was to determine whether there had been any damage to the shipment in transit by the railroad company. This hauling was done between March and May, 1951. Dunn Brothers had no property in the state except its equipment; and as soon as the job was completed, it moved the equipment out of the state.

The question is whether or not this transportation was interstate or intrastate; and in either event, whether or not it was subject to the tax in question.

The Federal cases on this question are legion. There are also a number of our own cases.

In the recent case of *Coleman, Attorney General,* v. *Trunkline Gas Company,* (Miss.) 63 So. 2d 73, in recognition of the Federal rule, this Court held that a privilege tax which was imposed upon a pipe line operator, whose operations were wholly and exclusively in interstate com-

merce, was violative of the commerce clause of the Fe
Constitution, and fell outside the field of legitimate
taxation. This decision involved a construction of Se
34, Chapter 138, Laws of 1934, as amended by Chapter
Laws of 1952, which undertook to levy a privilege
mileage basis on account of the state's protection.
record disclosed, however, that the gas company p
franchise tax, an income tax, and an *ad valorem* tax
the Court held that, in so doing, it was already en
to the State's protection.

The Federal courts have repeatedly held that
taxes cannot be collected upon the privilege of carryi
a business that is exclusively interstate in character.
tor Motor Service v. *O'Connor*, 340 U. S. 602, 71 S. Ct
95 L. Ed. 573; *Alpha Portland Cement Co.* v. *Mass*
setts, 268 U. S. 203, 69 L. Ed. 916, 45 S. Ct. 477; *Ozark*
Line Corp. v. *Monier*, 266 U. S. 555, 69 L. Ed. 439, 45
184.

It was pointed out in the opinion in the *Spector*
Service case, supra, that "The objection to its validity
not rest on a claim that it places an unduly heavy b
on interstate commerce in return for protection giv
the State. The tax is not levied as compensation fo
use of highways or collected in lieu of an *ad valorem*
erty tax. Those bases of taxation have been disclaim
the highest court of the taxing State. It is not a f
an inspection or a tax on sales or use. It is a 'tax
cise' placed unequivocally upon the corporation's fra
for the privilege of carrying on exclusively inte
transportation in the State."

In *Interstate Oil Pipe Line Company* v. *Ston*
Miss. 715, 35 So. 2d 73, which had under conside
Sections 10,105 and 10,109, Code of 1942, Ann

through a different paragraph of Section 10,109, *supra*, it was held that the tax there involved was on income derived from the transportation of oil by the pipe line from wells to shipping points and for pumping the oil into tank cars for shipment by rail out of the state. The opinion quoted from 11 Am. Jur., Commerce, Section 28, p. 29, as follows: "It is not within the power of the parties by the form of their contract to convert what is exclusively a local business, subject to state control, into an interstate business, protected by the commerce clause."

The quotation from the text was documented by *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17, 78 L. Ed. 622, 54 S. Ct. 267; *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 74 L. Ed. 504, 50 S. Ct. 267; *Browning* v. *Waycross*, 233 U. S. 16, 58 L. Ed. 828, 34 S. Ct. 578. The opinion also cited 15 C. J. S., Commerce, Section 18, pp. 278-291; to the same effect. The Court observed that "the oil was not committed by the owner to this pipe line company for transportation to another state, but to be transported to the railroad and there loaded into tank cars." The opinion then cited *Coe* v. *Errol*, 116 U. S. 517, 29 L. Ed. 715, 6 S. Ct. 475, 479, to show that the carrying of articles in carts or other vehicles to the depot, where the journey is to commence, is no part of the journey; and likewise the carrying of articles from the farm or forest to the depot is only an interior movement.

On the Pipe Line's appeal the Supreme Court of the United States affirmed *Interstate Oil Pipe Line* v. *Stone*, 337 U. S. 662, 93 L. Ed. 1613, 69 S. Ct. 1264.

Four of the Justices in an opinion written by Justice Rutledge said: "We do not pause to consider whether the business of operating the intrastate pipe lines is interstate commerce, for, even if we assume that it is, Missis-

sippi has power to impose the tax involved in this
Further, we do not find it necessary to dispute that
Supreme Court of Mississippi construed the statute as
posing a tax on the privilege of operating a pipe line wh
within the state, and not a tax solely upon the 'loca
tivities of "maintaining, keeping in repair, and other
in manning facilities"' situated in Mississippi, *Mem*
Natural Gas Co. v. *Stone*, 335 U. S. 80, 92, 93, 92 L.
1832, 1842, 1943, 68 S. Ct. 1475, or upon the gross rec
themselves, *Central Greyhound Lines* v. *Mealey*, 334
653, 92 L. Ed. 1633, 68 S. Ct. 1260. While we are of co
bound by the construction given a state statute by
highest court of the State, we are concerned with the
tical operation of challenged state tax statutes, not
their descriptive labels." The opinion also said: "Sinc
the activities upon which the tax is imposed are ca
on in Mississippi, there is no due process objection to
tax. The tax does not discriminate against interstate
merce in favor of competing intrastate commerce of
character. The nature of the subject of taxation m
apportionment unnecessary; there is no attempt to ta
terstate activity carried on outside Mississippi's bor
No other state can repeat the tax. For these reason
commerce clause does not invalidate this tax." Ju
Burton concurred in the result on the ground that the
position "was a tax on the privilege of operating a
line for transporting oil in Mississippi in intrastate
merce and that, as such, it was a valid tax." Justice
in the dissenting opinion, among other things, obse
that "An interstate journey must have a beginning
an end. Common sense rejects an extension of the jou
to the traveler's front door or the producer's farm or fa
when no through order for carriage is in effect. The
limits of interstate commerce in such fringe situation

uncertain. * * * This Court has interpreted the commerce clause to permit state nondiscriminatory taxation for the use of state facilities, upon the property used in interstate commerce, upon production for commerce and upon net proceeds therefrom. Through such taxes, the states may exact payment for their protection and encouragement of commerce. *Joseph* v. *Carter & W. Stevedoring Co.*, 330 U. S. 422, 429, 91 L. Ed. 993, 1001, 67 S. Ct. 815, and cases cited."

The only factual difference between the case of *Interstate Oil Pipe Line* v. *Stone, supra,* and the case now before the Court is that, in that case, the tax on income was derived from the transportation of oil from wells to the shipping points and pumping the same into the tank cars for shipment by rail out of the state—at the beginning of the journey—whereas, the tax here was imposed on income which was derived from hauling pipe from the railhead to the right of way—at the end of the journey.

In *Stone* v. *Memphis Natural Gas Co.*, 201 Miss. 670, 29 So. 2d 268, the appellee was held to be liable for the state franchise tax, although its business was solely and exclusively interstate, and it was not engaged in any intrastate business. The Court said that the franchise tax was not one upon "doing business" as that term is ordinarily understood. The opinion pointed out that there was "no attempt to tax interstate commerce as such, but the levy is an exaction which the State requires as a recompense for its protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State."

On the Gas Company's appeal, the decision of this Court was affirmed by the Supreme Court of the United States. *Memphis Natural Gas Co.* v. *Stone,* 336 U. S. 80, 92 L. Ed. 1832, 68 S. Ct. 1475. Three of the Justices held that the tax, under the construction of this Court, was additional recompense for protection of the pipe line's local activities, and could not therefore be regarded as one of the privileges of doing interstate business; that the activities taxed were not under the protection of the commerce clause; and that the burden of such tax was no more unreasonable than the permissible *ad valorem* tax. A fourth Justice held that the tax was within the territorial limits of the state's taxing power; that it placed no greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character; that it did not undertake to tax interstate activities carried on outside of the state's border; and that it could not be repeated by another state. The fifth Justice concurred in the result.

The language of Justice Reed, in his dissenting opinion in *Interstate Oil Pipe Line Company* v. *Stone, supra,* namely, that "an interstate journey must have a beginning and an end," must be kept in mind; likewise the opinion of the Supreme Court in *Coe* v. *Errol, supra,* that the carrying of articles in cars or other vehicles to the depot, where the journey is to commence, is no part of the journey; and that the carrying of articles from the farm or forest to the depot is only an interior movement. Again, the language of Justice Reed, in his dissenting opinion, *supra,* should be recalled, namely, that "common sense rejects an extension of the journey to the traveler's front door or to the purchaser's farm or factory when no through order for carriage is in effect." He again well said that "the exact limits of interstate commerce in such fringe situations are uncertain."

If the above reasoning is followed, the journey in interstate commerce in this case began at the railroad's depot in the State of California. The transportation of the pipe from the foundry to the depot was only an interior movement. The Transportation Company was the shipper. It consigned the shipment from a point in California to itself at a point in Mississippi. The railroad company, the interstate carrier, issued its bill of lading to the Transmission Company, as both consignor and consignee, showing its agreement to deliver the shipment from a depot in California to a railroad depot, or railhead in the State of Mississippi. When the shipment arrived at its destination, the Transmission Company, by an agent, inspected and accepted it. Following this acceptance, Dunn Brothers took over the shipment from the railroad. This was, in effect, a delivery to the Transmission Company. The interstate journey was then at an end. The railroad Company, the interstate carrier, had agreed to deliver the shipment from a point in California to a point in Mississippi, and this agreement of carriage had been gully performed. The Transmission Company then engaged another carrier, a motor carrier, Dunn Brothers, to deliver the shipment from the depot, or railhead, along its right of way; and the fact that this procedure had been agreed upon, prior to the railroad's delivery, did not change the essential features of the activity. Nor did the fact that Dunn Brothers held a certificate as a carrier for interstate commerce grant it immunity, when it was carrying intrastate commerce exclusively. It is only for the carriage within Mississippi that the tax is demanded. A local drayman or an intrastate carrier would have been obliged to pay the tax here demanded. If, under the circumstances of this case, appellee should prevail, then by reason of its claim of interstate commerce, it would escape the burdens which fall on its competitors in intrastate commerce. Evidently equality for, not favoritism to, interstate

commerce was the underlying purpose of Article I, Section VIII, cl. 3, of the U. S. Constitution.

The case of *Gross Income Tax Division* v. *J. L. Fox & Son,* 86 N. E. 2d 693, from the Supreme Court of Indiana, is directly in point.

The case of *American Express Co.* v. *Miller,* 104 Miss. 247, 61 So. 306, is not in point. In that case, the packages were delivered by the liquor dealers in Louisiana to the boats, and the masters issued bills of lading for the entire journey, across the state line, to the customers in Mississippi, collecting at the time the charge for the completed transportation, with no opportunity or right of the original shipper thereafter to accept or control the shipment. The transportation was continuous from the shipper to the consignee.

There is this additional reason to uphold this tax: The agreed statement of facts showed that Dunn Brothers made its deliveries between March and May of 1951; and that, as soon as the work was completed, it moved its equipment out of the state. Taxable property is assessed for *ad valorem* taxes, and the lien thereon attaches as of January 1st. Sections 9744-5, Code of 1942. Consequently Dunn Brothers was not liable for, and could not be required to pay, *ad valorem* taxes for 1951. There was no agreement or proof that it paid to the State of Mississippi any tax whatever. It had the protection of the laws of Mississippi in its operations and yet it is not shown to have paid the state anything "as a recompense for its protection of lawful activities carried on in this state by the corporation." *Stone* v. *Memphis Natural Gas Co., supra.* Interstate transportation should bear a fair share of the cost of the local government whose protection it enjoys. Many decisions of the Supreme Court of the United States show

that, so far as the commerce clause is concerned, state taxes may be validly laid on corporations who carry on local activities sufficiently separate from interstate commerce, even though such taxes amount to the same as if levied on the interstate business itself. *Independent Warehouses* v. *Scheele*, 331 U. S. 70, 91 L. Ed. 1346, 67 S. Ct. 1062; *McGoldrick* v. *Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. Ed. 565, 60 S. Ct. 388, 128 A. L. R. 876; *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331, 84 L. Ed. 304, 60 S. Ct. 273; *Southern P. Co.* v. *Gallagher*, 306 U. S. 167, 83 L. Ed. 586, 59 S. Ct. 389; *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604, 82 L. Ed. 1043, 58 S. Ct. 736; *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, 76 L. Ed. 1038, 52 S. Ct. 548; *Western Cartridge Co.* v. *Emmerson*, 281 U. S. 511, 74 L. Ed. 1004, 50 S. Ct. 383; *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U. S. 290, 66 L. Ed. 622, 42 S. Ct. 305; and *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, 63 L. Ed. 1084, 39 S. Ct. 522. See also *Stone* v. *Stapling Machines Co.*, (Miss.) 71 So. 2d 205, which the Supreme Court of the United States refused to review. See also *Mavar Shrimp & Oyster Co., Ltd.*, (Miss.) 73 So. 2d 109.

So, the service by Dunn Brothers in carrying the pipe, after its acceptance by the Transmission Company, from the depot or railhead in Mississippi to the right of way also in Mississippi, was an activity wholly within the State of Mississippi, was therefore intrastate, and the gross income therefrom was subject to the tax of two per cent. However, if it may be said that this was a fringe situation and therefore uncertain, nevertheless the appellee is still liable for this tax as a recompense for the protection which it was afforded by the state as it engaged in this activity. Thus, for both reasons, as above stated, the tax was properly assessed and collected. Hence the judgment of the trial court is reversed, and a judgment will be entered here for the appellant.

REVERSED AND JUDGMENT HERE FOR APPELLANT.

ROBERDS, P. J., AND HOLMES, ARRINGTON, AND ETHRIDGE, JJ., CONCUR.

Monday, June 13th, 1955, Court Sitting

No. 39,731

Alex. McKeigney, Chairman State Tax Commission

vs.

Dunn Brothers, Inc.,

This cause having been submitted at a former day of this term on the record herein from the Circuit Court of Hinds County and this court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause at the November 1954 Term—be and the same is hereby reversed and this court now, here, proceeding to render and enter the judgment that should have been entered in the court below doth order and adjudge that the appellee take nothing by its suit and that the appellant do have and recover of and from the appellee all of the costs in this court and in the court below to be taxed, etc.

IN THE SUPREME COURT OF MISSISSIPPI

No. 39,731

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION, REVIVED AS ALEX McKEIGNEY, CHAIRMAN OF STATE TAX COMMISSION

vs.

DUNN BROTHERS, INC.

On Suggestion of Error.

HOLMES, JUSTICE:

The original opinion in this case held, first, that the service by Dunn Brothers, in carrying the pipe from the depot or railhead in Mississippi to the right of way, also in Mississippi, was intrastate, and that the gross income therefrom was subject to the tax of 2%; and, secondly, that, even if such service was in fact not intrastate, nevertheless Dunn Brothers was liable for the tax as a recompense for the benefit and protection which the State afforded to the taxpayer while it was engaged in this activity.

The appellee has filed a vigorous suggestion of error. Due consideration has been given to it; and the Court deems it necessary to respond only to some of the reasons which are urged in connection with the second ground of the opinion.

It is contended that the Court erred in assuming that the taxpayer had in fact paid no taxes to the State, when the stipulation was silent about this matter. The original declaration charged that the plaintiff had "promptly paid any and all lawful taxes levied by the State of Mississippi against its property * * *". The Tax Commission answered

that it "does not know what taxes, if any, plaintiff has paid to the State of Mississippi, but specifically denies that plaintiff has promptly paid any and all lawful taxes levied by the State Tax Commission against its property * * *". In the stipulation, which contained the agreed statement of facts, there was no reference whatever to tax payments.

Since the suit by Dunn Brothers was for the purpose of recovering taxes which it had paid under protest, it of course had the burden of showing that it was entitled to a recovery. In *Coleman, Attorney General,* v. *Trunk Line Gas Company,* Miss., 63 So. 2d 73, the gas company proved that it had paid a franchise tax, an income tax, and an *ad valorem* t[illegible]. The Court, in that case, held that the company, by reason of the payment of these taxes, was already entitled to the State's protection, and that the privilege tax there involved could not be imposed for such purpose. Thus evidence of payment of other taxes was relevant on the question as to whether or not Dunn Brothers was entitled to recover the taxes which it had previously paid under protest. But, as stated, it offered no proof as to payment of other taxes. So even if the appellee had in fact paid other taxes, still in the absence of proof thereon, it was not a violent inference that the appellee had paid no taxes. Cases must be reviewed on the record before the appellate court.

As stated in the original opinion, the tax was collected under Sections 10105 and 10109, Code of 1942 annotated. The latter section is comprised of nine paragraphs, the last of which contains a provision for certain exceptions or limitations. None of the paragraphs are numbered. It it true that the argument for and against the imposition of this tax revolves around the paragraph which reads as follows: "Upon every person engaging or continuing

within this state in the business of operating an express business, transporting freight or passengers from one point to another in this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business." Obviously, this paragraph was very pertinent in dealing with the intrastate feature.

But in the same section and subsequent to the above quotation is another paragraph which reads as follows: "Upon every person engaging or continuing within this state in the business of operating motor vehicles on the public highways of this state for the transportation of persons or property for compensation or hire, there is likewise hereby levied and shall be collected a tax, on account of the businesss engaged in, equal to two per cent of the gross income of the business; but such tax shall not apply to persons engaged in transporting school children under contract with counties or school districts." This paragraph applies to the operation of motor vehicles for the transportation of persons or property for compensation or hire on the public highways of the State, and is not limited merely by such transportation from one point in the State to another. Consequently it is more far reaching than the first quoted paragraph.

The last paragraph of Section 10109, the exception or limitation paragraph, is as follows: "There shall be excepted from the gross income used in determining the measure of the tax imposed in this section so much thereof as is derived from the business conducted in commerce between this state and other states of the United States, or between this state and foreign countries which the State of Mississippi is prohibited from taxing under the constitution of the United States of America. And nothing contained in this section shall be construed to levy a tax upon

the operation by municipal corporations of any electric, gas or water system owned by the municipality operating it." The evident purpose of the Legislature was to tax all gross income, in the enumerated instances, except so much thereof as is derived from interstate commerce between this State and other states or foreign countries, which the State is prohibited from taxing under the Constitution of the United States. But the tax here in question is not prohibited by the Constitution of the United States. See the many citations in the original opinion.

The mere fact that the parties confined their argument to the first quoted paragraph does not preclude the Court from considering the entire section.

We adhere to the views expressed in the original opinion, and it follows that the suggestion of error should be, and is, overruled.

SUGGESTION OF ERROR OVERRULED.

ROBERDS, P. J., AND LEE, ARRINGTON AND ETHRIDGE, JJ., CONCUR.

Friday, July 15, 1955, Court Sitting

No. 39,731

A. H. Stone, Chairman, State Tax Commission,
Revived as Alex McKeigney, Chairman of
State Tax Commission

vs.

Dunn Brothers, Inc.,

This cause this day came on to be heard on the suggestion of error filed herein and this court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said suggestion of error be and the same is hereby overruled.

IN THE CIRCUIT COURT, FIRST DISTRICT
HINDS COUNTY, MISSISSIPPI

No. 13,522.

DUNN BROS., INC.

V

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION.

Written Ruling of Circuit Court Judge.

Dunn Bros. paid certain sales taxes to the State Tax Commission and brought this suit against A. H. Stone, Chairman, to recover the same. The taxes were paid under and by virtue of section 10109 Mississippi Code 1942, which levied sales tax upon every person engaged in business of transporting freight or passengers from one point to another in this State. Dunn Bros. claim their business was interstate and foreign commerce and under the protection of the Commerce Clause of the Constitution they were not liable for payment of the tax, which is admittedly a privilege tax.

The Tennessee Gas Transmission Company was engaged in building a large pipe line across the State, originating in the Southwest and crossing several states, terminating at some point in the East. The pipe originated at its point of manufacture in California, and from there was shipped by rail to certain convenient rail spots near the right of way in this State where the plaintiff's trucks took over and hauled the pipe and strung it along the pipe line right of way, at convenient places to be integrated into the pipe line by Tennessee Gas Transmission Company.

There was no through bill of lading. It appears that it is contrary to the practice of commerce that through

bills of lading be issued where different forms of transportation are adjunct to each other, such as rail-water transportation, or rail-truck transportation.

The pipe was loaded at the scene of its manufacture in California and shipped by rail to Tennessee Gas Transmission Company to the various rail points in Mississippi. At these points a new bill of lading was issued, the Tennessee Gas being the consignor and consignee therein; the destination being the ultimate resting place of such pipe along the right of way. The plaintiff furnished the facilities for hauling from the various rail points in Mississippi to the actual location of pipe line right of way.

Plaintiff insists that this was an interstate shipment in that the movement of the pipe had every character and incident of the interstate shipment from its point of origin to its point of destination.

Plaintiff quotes numerous decisions of the United States Supreme Court and of other federal courts and certain Interstate Commerce Commission holdings, sustaining him in this position. It appears from the federal cases quoted in plaintiff's brief that a through bill of lading is not necessary to characterize the shipment as being in interstate or foreign commerce; that acceptance or passage of title is not necessarily the controlling feature; and even that the integration of the produce with other products of similar kind or charge of form through certain manufacturing processes will not

destroy its character as interstate commerce. Shipments from within a state to a point such as a coastal point within the same state, where the ultimate destination is interstate or foreign commerce will preserve the interstate char-

acter of the shipment. The court applies what is known as "The essential character of the movement" theory.

Throughout these decisions of the federal courts involving the commerce clause there runs the following consistent theme. What was the bona fide and true intent and purpose of the parties in initiating the shipment? If the true intent and purpose of the shipper and consignee is that if ultimate destination is originally conceived to be without the originating state it is in interstate commerce. The manner and method of handling does not seem to be important.

Some of the leading cases quoted and relied upon by the plaintiff are: *So. Pac. Terminal Co.* v *I C C,* 219 U S 498, 55 L ed. 310; *Baltimore & O S W R Co* v *Settle,* 260 U S 166; *Railroad Commission of Ohio* v *Worthington,* 56 L. ed. 1008; *United States* v *Erie Railroad Co.* 280 U S 98; *Texas & N O R Co* v *Sabine Tram Co,* 227 U S 111; and *Hughest Brothers Company* v *Minnesota,* 272 U S 469. Also the C C A case *Texas* v *Anderson, Clayton & Co.,* 92 F (2) 104.

The defendant's demurrer having been overruled and answer filed, this case was submitted on agreed statement of facts. It appears to me that the defendant, Tax Commission, in the agreed statement of facts has agreed that this shipment had the essential character of a shipment in interstate and foreign commerce, as I have described the same above. I note from the

page 4

agreed statement of facts, on page 4 thereof, where it is agreed by the parties as follows:

> "It was the intent and purpose of Tennessee Gas Transmission Company in originally ordering the

shipment from the steel companies located outside the State of Mississippi for all of said pipe to be transported from the point of manufacture directly to the pipeline right of way within the State of Mississippi, by the most direct route available. The various railheads within the State of Mississippi to which the pipe moved via railroad were never intended by the Tennessee Gas Transmission Company to be the ultimate destination of the pipe, but, on the contrary, it was the intent of the shipper at all times that the pipe be transported by common carriers from the point of manufacture outside of Mississippi to the pipeline right of way within Mississippi."

It appears thus that the defendant admits that the character of the shipment was essentially one in interstate and foreign commerce, as the same is admeasured by the accepted rules and principles laid down by the Supreme Court of the United States.

Farther on in the agreed statement of facts the defendant agrees to the following:

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"* * * Prior to the time the shipments originally started from the pipe manufacturer, arrangements were made between the Tennessee Gas Transmission Company and Dunn Bros., Inc., plaintiff herein, under which the plaintiff agreed to transport the pipe from the railheads in Mississippi to the pipeline right of way in Mississippi."

Furthermore in the agreed statement of facts the defendant agreed to the following:

"From the time the pipe left the manufacturer in California until the pipe arrived at the right of way, the pipe was at all times under the care and supervision of the aforementioned common carriers, either railroad or the plaintiff. It is understood, however,

that the defendant reserves the right to take the position and argue that, as a matter of law, the legal possession of the pipe passed to Tennessee Gas Transmission Company upon the completion of the railroad portion of said transportation."

It is observed from the above quotation from the agreed statement of fact that the defendant reserves the right to argue as a matter of law that the legal possession of the pipe passed to Tennessee Gas Transmission Company upon completion of the rail portion of the said transporation. But as plainly stated in the quoted cases, it has been specifically held by the Supreme Court of the United States that the passage

or vestiture of title is not an element that changes the character of an interstate shipment to an intrastate one.

So, it would appear to me that in view of the admissions that it was the bona fide and actual intent and purpose that the destination of this shipment was the pipeline right of way in Mississippi, and that it should move by common carrier from its origin in California to its destination, it is a practical admission that shipment was purely in interstate commerce and protected by the Commerce Clause of the Constitution.

It is further significant to me that the plaintiff's certificate of convenience and necessity, granted by the Interstate Commerce Commission contains the following restriction:

> "RESTRICTION: The service authorized herein is restricted to traffic moving to or from pipeline rights of way."

The declaration states, and it is not denied or admitted, that this plaintiff corporation was organized on

the 2d of June, 1950, and that it is a Texas corporation, and domiciled in the City of Dallas. It appears that since its business is thus restricted to hauling pipe to pipeline rights of way, and in consideration of the recent organization of the corporation and its domicile in the Southwest, the corporation was actually created at and about the time the numerous pipe lines were being constructed and pushed across the continent from the Southwest to the Eastern markets. In other words, it appears reasonably deducible that this corporation had its

inception and founding for the purpose of handling this type of services for the construction of these transcontinental gas lines. The process of construction of which had its inception in the last decade.

Purpose and intent is subjective in its nature and sometimes must be deduced upon the facts and circumstances. However, in this case it is not necessary to resort to deduction in view of the plain admissions made by this defendant. If it were the true intent and purpose of the shipper in California, the place of origin, that the place of destination would be at and beside the pipe lines in Mississippi, then this is truly an interstate shipment and under the protection of the Commerce Clause. I do not see how any other conclusion could be drawn under the decisions of the Supreme Court of the United States.

The defendant Tax Commissioner seems to rely mainly upon certain statements that have appeared in a few very recent decisions of the United States Supreme Court to the effect that "interstate commerce should be made to pay its way." The expression seems to have become a kind of slogan for the state taxing authorities throughout the country.

It certainly could not have been the intent of the Supreme Court in infect the settled law with uncertainty by the use of such a phrase.

It is difficult to understand what the meaning of the phrase is. It appears that any shipment would either be in interstate or intrastate commerce and would be taxable or

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not taxable, according to the plain facts of the case.

Therefore, judgment will be for the plaintiff.

/s/ M. M. McGowan

Circuit Court Judge.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 13522

DUNN BROS., INC.

VS

A. H. STONE, CHAIRMAN, ETC.

Judgment.

This day came on for hearing the above styled and numbered cause on the declaration, as amended, answer filed thereto, and agreed statement of facts filed herein, and the Court having heard the argument of counsel for the parties, and having read the briefs filed herein by the parties hereto, a jury having been waived, and being of the opinion that the plaintiff should have the relief sought;

It is, therefore, ordered and adjudged that the plaintiff, Dunn Bros., Inc., do have, and is hereby granted, a judgment of and from the defendant, A. H. Stone, Chairman, State Tax Commission, in the amount of Five Hundred Fifty-Seven and 93/100 Dollars ($557.93), with six per centum interest thereon, compounded annually, from May 14, 1953, to the date hereof, together with all costs of this suit.

It is further ordered that the opinion of this Court rendered in this cause be made a part of the record in this cause, as a part of this order.

Leon F. Hendrick
Circuit Judge

APPENDIX B.

SALES TAX LAW

Chapter 119, Laws of 1934, As Amended

AN ACT to provide for the raising of additional public revenue by imposing a tax upon the privilege of engaging in certain businesses in Mississippi, to provide for the ascertainment, assessment and collection of said taxes; to provide penalties for the violation of the terms of this Act and to repeal Chapters 90 and 91 of the Laws of Mississippi of 1932.

Section 1. (10103 Miss. Code 1942) **Title**—Be it enacted by the Legislature of the State of Mississippi, that this Act may be cited as the Emergency Revenue Act of 1934.

(10104 Miss. Code 1942) **Definitions**—(1) When used in this Act, the term "person" or the term "company" herein used interchangeably, includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, or any other group or combination acting as unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

(2) The term "Tax Commission" means the State Tax Commission of the State of Mississippi.

(3) The word "Commissioner" when used in this Act, means the chairman of the State Tax Commission.

(4) The term "tax year" or "taxable year" means either the calendar year, or the taxpayer's fiscal year when permission is obtained from the Commission to use same as the tax period in lieu of the calender year.

(5) The term "sale" or "sales" includes the barter or exchange of properties as well as the sale thereof for money, every closed transaction by which the title to taxable property passes shall constitute a taxable event whether the compensation is by money or service, or other thing of value, constituting a sale.

(6) The word "taxpayer" means any person liable for any tax hereunder.

(7) The classification of "wholesaler" of "jobber" shall apply only to a person doing a regular organized wholesale or jobbing business known to the trade as such, selling only to licensed retail merchants or jobbers, for purposes of resale. The classification of "wholesale sale" shall apply only to a sale of tangible personal property when made to a dealer or jobber, licensed under section 3 of this act, for the purpose of resale in the regular course of business; a sale of tangible personal property which is to become a component part of a structure or improvement erected, constructed, repaired, or made, when such sale is made to a contractor who is taxable under section 2-e of this act on the contract under which the material is to be used; a sale of tangible personal property used or to be used or consumed in the furtherance of interstate transportation or interstate commerce and a sale of tangible personal property which is to be used as a container or covering for the protection or preservation of merchandise sold, or property upon which service has been rendered.

Sales of tangible personal property to manufacturers or processors, of machinery and machine parts which are exclusive necessities to processing within this state shall be construed to be wholesale sales, and the gross proceeds from such sales shall be taxable at the wholesale rate.

Provided, further, that sales of industrial materials to manufacturers only which go directly into the manufacturing process may be reported by the seller as wholesale sales, taxable at the wholesale rate. Provided, however, that such sales may be classed as wholesale sales only if evidenced by proper and adequate invoices and records.

(8) The classification of "retail merchant" shall apply only to a person doing a regularly organized retail business known to the trade as such and who maintains a store, open at reasonable hours or who operates as a transient vendor, as defined in the privilege tax law, for sale to the public of such goods, wares or merchandise as may be handled.

(9) Sales to "farm commissaries" shall be regarded as retail sales unless such farm commissaries do a regularly organized retail business with the general public by maintaining a store, as defined in the privilege tax law, open at reasonable hours for sale to the public of such goods, wares or merchandise as may be handled.

(10) Provided that, upon resale by such commissaries, of merchandise on which the tax has been paid to the wholesaler, no additional tax under the provisions of Section 2-c of this act shall be paid or collected by the seller or owner of such commissaries or by the commissioner against the owner thereof.

(11) The term "gross income" means the gross receipts of the taxpayer derived from trades, business, commerce or sales and the value proceeding or accruing from the sale of tangible personal property, and all receipts, actual or accrued, by reason of the investment of the capital of the business engaged in, and without any deductions on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or

any other expense whatsoever; and without any deduction on account of losses.

(12) The term "business" when used in this act shall include all activities or acts engaged in (personal or corporate) or caused to be engaged in with the object of gain, benefit, or advantage either direct or indirect, and not exempting subactivities producing marketable commodities used or consumed in the main business activity each of such subactivities shall be considered business engaged in, taxable in the class in which it falls.

(13) The term "gross proceeds of sales" means the value proceeding or accruing from the full sale price of tangible personal property including carrying charges or any other addition to the selling price, on account of deferred payments by the purchaser, without any deduction on account of the cost of property sold, the amount allowed for a trade-in taken as part payment, expenses of any kind, or losses. Provided, that the term "gross proceeds of sales" shall include the value of any goods, wares, merchandise or property withdrawn or used from an established business or from the stock in trade for consumption or use in the business or by the owner. But the words "gross income" and "gross proceeds of sales" shall not be construed to include goods, wares or merchandise, or the value thereof, returned by customers when the sale price is refunded either in cash or by credit; nor cash discounts allowed and taken on sales.

Section 2. (10105 Miss. Code 1942) **Tax Levied**—There is hereby levied and shall be collected annual privilege taxes, measured by the amount or volume of business done, against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values, or gross income, or gross proceeds of sales, as the case may be, as follows:

Section 2-a. (10106) **Mining, etc.**—Upon every person engaging or continuing within this state in the business of mining, quarrying, drilling or otherwise producing for sale, profit, or commercial use, limestone, sand, gravel, or other mineral or natural resource products, except oil and natural gas, the amount of such tax to be equal to the value of the articles produced, and shown by the gross proceeds derived from the sale thereof by the producer (except as hereinafter provided) multiplied by the respective rates as follows: Limestone, sand, gravel, or other mineral products, except oil and natural gas, two per cent.

The measure of this tax is the value of the entire production in this state, regardless of the place of sale or the fact that delivery may be made to points outside of the state.

All privilege taxes levied upon persons engaged in the production of natural resource products by this act shall be a lien upon all such products so produced and such lien shall be entitled to preference over all judgments, executions, encumbrances or liens, whensoever created. All persons to or through whom the title to such products pass shall be jointly and severally liable for such tax until the same is paid in full.

If any person liable for any tax under this section shall ship or transport his products, or any part thereof, out of this state without making sale of such products, the value of the products in the condition or form in which they existed immediately before transportation out of the state shall be the basis for the assessment of the tax imposed in this section. The Commissioner shall prescribe equitable and uniform rules for ascertaining such value; and the tax imposed in this section shall be due and pay-

able as of the date of such removal from the state, whether said products have been sold or not.

In computing the tax levied under this section, where the gross proceeds of sales of such natural resource products are taken as the measure of the value of such products for the purpose of computing the tax, if such products shall have been sold on a delivered price, the actual freight charge prepaid by the taxpayer or included in the invoice price, on such natural resource products, to the place of delivery, shall be deducted from the gross proceeds of sales used in determining the amount of the tax.

The tax imposed in this section upon persons engaged in the business of mining or producing, for sale, profit or commercial use, shall be collected by the Commissioner, in the manner provided in this act, from the person in charge of the production operations, and the Commissioner is hereby authorized to make such investigations and inspections of the production operations, from time to time, as he may deem necessary for the purpose of ascertaining the correct amount of tax due.

Section 2-b. (10107) **Manufacturing**—That Section 2-b of Chapter 119, Laws of 1934, and all amendments thereof are hereby repealed.

See Section 2-c regarding retail sales made by manufacturers.

Section 2-c. (10108) **Selling, etc.**—Upon every person engaging or continuing within this state in the business of selling any tangible personal property whatsoever, (not including, however, bonds or other evidence of indebtedness, or stocks), there is likewise hereby levied, and shall be collected, a tax equivalent to two per cent of the gross proceeds of sales of the business; provided, however, that in the case of a wholesaler or jobber, the tax

shall be equal to one-eighth of one per cent of the gross proceeds of sales of the business. Provided further, that in the case of farm tractors which are adapted solely to agricultural purposes, and when sold to farmers, the tax shall be equivalent to one percent of the gross proceeds of sales.

Provided, further, that in the case of dealers in fluid milk that is perishable in twenty-four hours and commonly known as pasteurized milk, the tax shall be equivalent to one per cent of the gross proceeds of the sale of said milk.

Provided, however, that any person engaging or continuing in the business as a retailer and a wholesaler or jobber shall pay the tax required on the gross proceeds of sales of each such business at the rates specified, when his books are kept so as to show separately the gross proceeds of sales of each business; and when his books are not so kept he shall pay the tax as a retailer; and provided, further, that any such person engaging or continuing in business as a retailer and as a wholesaler or jobber shall pay the tax as a retailer on the gross proceeds of sales derived from all sales made by him to any person other than a licensed merchant purchasing for resale in the regular course of business.

A person exercising any privilege taxable under Section 2-a of this Act and engaging in the business of selling his natural resource products at retail in the state shall be required to make returns of the gross proceeds of such retail sales and pay the tax imposed in this section, for the privilege of engaging in the business of selling such natural resource products at retail in this state; and the value, or gross proceeds of sales, of such natural resource products thus sold by the producer at retail and in-

cluded in the measure of the tax imposed in this section, shall be deducted from the gross income, or gross proceeds of sales, used in determining the measure of the tax imposed upon such producer in said Section 2-a of this Act.

But any person exercising any privilege taxable under Section 2-a of this Act and engaging in the business of selling his natural resource products to manufacturers, wholesalers, jobbers, or licensed retailers, shall not be required to pay the tax imposed in this section for the privilege of selling such natural resource products at wholesale. Nor shall any person exercising any privilege taxable under Section 2-a of this Act be required to pay the tax imposed in this section for the privilege of selling his natural resource products for delivery outside of this state. But the gross income derived from the sale of such natural resource products to manufacturers, wholesalers, jobbers, or licensed retailers, and the gross income derived from all sales of such natural resource products for delivery outside of this state, shall be included in determining the measure of the tax imposed upon such producer in said Section 2-a of this Act.

That, notwithstanding the repeal of Section 2-b of Chapter 119, Laws of 1934, as amended, same being Section 10107 of the Mississippi Code of 1942, by House Bill 311, of the 1946 Regular Session of the Legislature, a person engaging or continuing within this state in the business of manufacturing, compounding, or preparing for sale, profit, or commercial use, either directly or through the activity of others, in whole or in part, any article or articles, substance or substances, commodity or commodities, and engaged in the business of selling his manufactured products, at retail in the state, shall be required to make returns of the gross proceeds of such retail sales

and pay the tax imposed in Section 2-c of said Chapter 119, Laws of 1934, as amended, same being Section 10108 of the Mississippi Code of 1942, for the privilege of engaging in the business of selling such manufactured products at retail in this state.

But notwithstanding the repeal of said Section 2-b of said Chapter 119 by said House Bill 311, of the 1946 Regular Session of the Legislature, any person engaging in this state in the business of manufacturing, compounding, or preparing for sale, profit, or commercial use, either directly or through the activity of others, in whole or in part, any article or articles, substance or substances, commodity or commodities, and engaging in the business of selling his manufactured products to manufacturers, wholesalers, jobbers, or licensed retailers, shall not be required to pay the tax imposed in said Section 2-c of said Chapter 119 for the privilege of selling such manufactured products at wholesale. Nor shall such person be required to pay the tax imposed in said Section 2-c of said Chapter 119 for the privilege of selling his manufactured products for delivery outside of this state.

Section 2-d. (10109) **Public Utilities, etc.**—Upon every person engaging or continuing within this state in the business of owning or operating a water or public sewerage system, or owning or operating a street railway for the transportation of freight or passengers for hire, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business.

Upon every person engaging or continuing within this state in the business of furnishing to consumers, electricity, electric lights, current, power or gas, natural or artificial, there is likewise hereby levied and shall be

collected a tax on account of the business engaged in, equal to one per cent of the gross income of the business, when such electricity, electric lights, current, power or gas is sold for industrial purposes, and a tax on account of the business engaged in, equal to two per cent of the gross income of the business when such electricity, electric lights, current, power or gas is sold for any other purpose.

Upon every person engaging or continuing within this state in the business of owning or operating a telegraph business, or owning or operating a telephone business for the transmission of messages or conversations between points within this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business.

Upon every person engaging or continuing within this state in the business of operating a railroad for the transportation of freight or passengers for hire between points within this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business.

Upon every person engaging or continuing within this state in the business of operating a sleeping or palace car business, carrying passengers from one point to another in this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business.

Upon every person engaging or continuing within this state in the business of operating an express business, transporting freight or passengers from one point

to another in this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business.

Upon every person engaging or continuing within this state in the business of operating a pipe line for transporting for compensation or hire from one point to another in this state oil or natural gas or artificial gas through pipes or conduits in this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business.

Upon every person engaging or continuing within this state in the business of operating motor vehicles on the public highways of this state, for the transportation of persons or property for compensation or hire, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business; but such tax shall not apply to persons engaged in transporting school children under contract with counties or school districts.

There shall be excepted from the gross income used in determining the measure of the tax imposed in this section so much thereof as is derived from the business conducted in commerce between this state and other states of the United States, or between this state and foreign countries which the State of Mississippi is prohibited from taxing under the constitution of the United States of America. And nothing contained in this section shall be construed to levy a tax upon the operation by municipal corporations of any electric, gas or water system owned by the municipality operating it.

Section 2-e. (10110) **Contracting, etc.**—Upon every person engaging or continuing in this state in the business of contracting for a fixed price, commission, fee or wage, to build, erect, construct, repair, grade, excavate, drill, explore, test, survey, mine, install in or add to any highway, street, sidewalk, bridge, culvert, sewer or water system, drainage, or dredging system, levee, levee system, or any part thereof, electric or steam railway, reservoir, or dam, hydraulic or power plant, electric lighting or power system, steam heating plant or system, transmission line, pipe line, tower dock, storage tank, wharf, excavation, grading, water wells, gas wells, oil wells, or any part thereof, when the gross amount of the total contract price or the gross amount received as compensation exceeds the sum of three thousand dollars ($3,000.00), there is hereby levied and shall be collected a tax on account of the business engaged in equal to one per cent of the total of the contract price, or the compensation received. The tax imposed in this section is levied upon the prime contractor and shall be paid by him.

Provided, however, that a contractor performing contracts to erect any building, the contract price of which amounts to twenty five thousand dollars ($25,000) or more, shall also operate under the provisions of this section when building, erecting, repairing, installing in or adding to any such building or structure not listed herein.

Provided, that where the work to be performed is sublet by the prime contractor to different persons, or in separate contracts to the same person, each person performing any part of said work shall be liable for the amount of the tax which accrues on account of the work performed by such person, when the tax heretofore im-

posed has not been paid upon the whole contract by the prime contractor.

Provided, further, that where any person engaged in any business on which a tax is levied in Section 2-f of this act, also qualifies as a contractor, and contracts with the owner of any project to perform any services herein taxed, where the contract price or the compensation received exceeds the sum of three thousand dollars ($3,000.00), such person shall likewise pay the tax imposed by this section on account of said contract, in lieu of the tax imposed by Section 2-f of this Act.

It is hereby declared to be the purpose of this section to impose a tax on the business of contracting within this state, in all instances where the total contract price or the compensation received amounts to more than three thousand dollars ($3,000.00), when the price to be paid or the compensation received for any services required or has required the use of equipment or tools of any kind, or the supplying of any material which has become an integral part of such contract. And to the end that the state may receive the tax due in every instance, any person entering into any contract, as defined in this section, where the total contract price, or the compensation received amounts to more than ten thousand dollars ($10,000.00) shall, before entering into the performance of such contract, execute and file with the chairman of the State Tax Commission a good and valid bond in a surety company authorized to do business in this state, or with sufficient sureties to be approved by the commissioner, conditioned that all taxes which may accrue to the State of Mississippi under this section on account of the execution of such contract will be paid when due, and the execution and filing of said bond shall be a condition precedent to commencing work on any contract in the State of Mis-

sissippi. Provided, however, that any taxpayer may pay the tax in advance on any contract in lieu of furnishing bond.

Every person failing either to procure the permit required by this act, or to execute the bond herein provided, or to pay the tax in advance, before beginning the performance of any contract shall be denied the right to perform such contract until he complies with such requirements, and the attorney general is hereby authorized to proceed by injunction, when requested by the commissioner so to do, to prevent by injunction any activity in the performance of such contract until either such permit is secured, or such bond is executed and filed, or such tax is paid in advance, and any temporary injunction enjoining the execution of such contract shall be granted without notice by any judge or chancellor now authorized by law to grant injunctions.

Provided, that where any person engaged in any business which is subject to the taxes levied in Section 2-f of this act, and who performs service for a contractor as defined in this section, may report the gross income from such services at the rate of one-eighth of one per cent in lieu of the two per cent rate levied in Section 2-f. Provided, however, such services must be on the structure or improvement being erected or repaired and the contract must be taxable under this section.

Section 2-f. (10111) **Miscellaneous Businesses**—(1) Upon every person engaging or continuing within this state in any of the following businesses, there is likewise hereby levied and shall be collected a tax on account of the business engaged in equal to 2% of the gross income of the business:

Aeroplane repair and service shops
Automobile repair shops
Automobile garages
Automobile fender and body repair shops
Automobile service stations
Battery stations
Motorcycle repair shops
Billiard, pool, and domino parlors
Bowling and ten pen alleys
Cleaning, pressing, and dyeing
Cold storage plants
Cold storage lockers
Cotton compresses
Cotton gins
Cotton warehouses
Custom creosoting, custom planing, custom sawing, and any other custom processing for a fee.
Electricians and all repairs of electrical equipment not elsewhere taxed.
Foundries, machine or general repair shops not elsewhere taxed.
Hotels
Jewelry and watch repairing
Laundries
Mattress renovators
Meat curing plants
Plumbers or pipe fitters
Refrigerator repair shops
Radio repair shops
Shoe repair shops
Tourist camps, or courts
Tin and sheet metal repair shops
Vulcanizing and recapping of tires
Transfer business
Storage warehouses.

Welding shops
Woodworking and wood turning repair shops
Renting or leasing of tangible personal property
Furniture repairs and upholstery shops
Office and business machine repairs
Repairs to air conditioning
Elevator repairs
Photographers and film developers
Termite and pest control service
Storage lockers
Grading, excavating or landscaping
Services performed in connection with the surveying, exploring, developing, producing, distributing or testing of oil, gas, and other mineral resources, not elsewhere taxed.

Provided, however, that in computing the tax levied under this section, if the taxpayer is a natural person, and employs no assistant in rendering the service taxed, there shall be deducted from the gross income of the taxpayer, so as to be taxed, so much thereof as has been received by him as compensation for personal services rendered by him in person to others, regardless of whether or not such personal service includes the incidental use of machinery, for a consideration (as distinguished from gross income received by the taxpayer as a result of the activities of his employees or other persons or services in connection with the operation of machines, or gross income or gross proceeds of sales derived from the production or sale of tangible personal property). Provided, however, that if any person exercising any privilege taxable under this section shall engage in any business activities which are taxable under any of the preceding sections of this act and shall be liable on account of such business activities for the payment of a tax under any such

preceding section, no deduction for personal services shall be allowed in determining the measure of the tax imposed in such preceding section.

Section 2-g. (10112) **Consolidated Returns**—When any person is engaged in two or more forms of business activities taxable under the provisions of this act, which are inter-related, or which are of like character, such person shall file a consolidated return covering all business activities, which are thus inter-related or of like character.

Section 2-h. (10113) **U. S. Gov't. Sales, etc.**—In computing the amount of tax levied under this act, there shall be excepted from the gross proceeds of sales, so much thereof as is derived from sales of tangible property to the United States Government or the State of Mississippi, its departments and institutions, counties, and municipalities and upon the business of transporting sand or gravel when consigned to the United States Government, the State of Mississippi, its departments and institutions, a county, municipality, or sub-division thereof, and used for road construction or maintenance, or from business which the State of Mississippi is prohibited from taxing under the constitution of this state or the constitution of the United States, and all freight shipments of commercial fertilizers moving on intrastate rates within the state are hereby exempted from all taxes levied and assessed by Section 2-d of Chapter 119 of the General Laws of Mississippi of 1934. Provided further in computing the amount of tax levied under this act against persons taxable under Section 2-f of said act, as amended, there shall also be excepted from the gross income of such businesses, so much thereof as is derived from charges for labor to the United States Government or the State of Mississippi, its departments and institutions, counties, and municipalities.

Section 2-i. (10114) **Tax on Gas, Tobacco, Beer, etc.**—And in computing the amount of tax levied under this act, there shall also be excepted from the gross income of the business, or gross proceeds of sales, as the case may be, all sums received or collected as taxes, on the sale of gasoline and oils; and all sums received or collected as taxes levied by the State of Mississippi on tobacco, beer, wine and malt; and all sums received or collected as Federal Retailers' Excise Taxes.

Section 3. (10115) **Must Obtain License From the Commissioner.**—If any person shall engage or continue in any business for which a privilege tax is imposed by this act, as a condition precedent to engaging or continuing in such business, he shall apply for and obtain from the Commissioner a license to engage in and to conduct such business, upon the condition that he shall pay the tax accruing to the State of Mississippi under the provisions of this act; and shall keep adequate records of such business as required by Section 8 of this act, including invoices and other records of all purchases and sales; and such invoices and records shall be open for inspection by the Commissioner or any of his authorized agents, at any reasonable time; and failure to keep, produce and allow such inspection of said invoices and other records shall be the cause for revoking such license. Upon receipt of such license, the applicant shall thereby be duly licensed to engage in and conduct such business. Said license shall continue in force so long as the person to whom it is issued shall continue in the same business at the same location, unless revoked by the Commissioner for failure to keep and preserve and allow inspection of the records and invoices herein required. The Commissioner is hereby authorized to revoke the license of any person failing to comply with the requirements hereof, after giving to the person holding such license, ten days notice of the intention of the

Commissioner to revoke such license. And unless good cause be shown within said ten days why such license should not be revoked, the Commissioner may revoke such license, and may for good cause shown, grant a new license under such conditions as the commissioner may prescribe; and upon revocation of such license, or engaging or continuing in business after such license is revoked, or without procuring such license, shall subject such person to all the penalties imposed by Section 15 of this act. Provided further that any person now holding a license heretofore issued under the provisions of this act, before this amendment, shall not be required to obtain a new license unless he shall change the nature or location of his business. But the provisions with reference to keeping and exhibiting the invoices and records herein required shall apply to all persons who continue in business under licenses heretofore issued.

Section 4. (10116) **Exemptions**—The tax levied by this act shall not be collected in the following instances:

(a) All sales on which a tax is paid under the Sea Foods Act and the gross income subject to an amusement tax under Chapter 124, Laws of 1934, and amendments thereto; and all sales to manufacturers of natural resource products in the original state or condition of sale on which a severance tax is paid under the provisions of Chapter 192, Laws 1946, and amendments thereto.

(b) All sales made by agricultural or cooperative associations organized under Chapter 5, Code of Mississippi of 1942, of agricultural products, or the by-products thereof produced in the preparation or processing of such agricultural products for market for the benefit of the producer thereof, and the products of farm, grove or garden.

(c) The gross income of cemetery associations.

(d) Sales of tangible personal property to and the gross income of hospitals or infirmaries owned and operated by a corporation or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder, group, or individual, and which are subject to and governed by Section 6 of Chapter 363, Laws of 1946, as amended.

(e) The gross proceeds of sales of cotton, whether lint cotton or seed cotton, baled cotton, whether compressed or not, and cotton seed in its original condition.

(f) Amounts received from the sale of school books.

(g) Sales of all fertilizers, bagging and ties for baling cotton, insecticides, seeds, boxes, crates, hay baling wire, bags, cotton sacks, and syrup cans used in growing and preparing agricultural products for market.

(h) The gross proceeds of sales made by persons who produce livestock, poultry and other products of farm, grove or garden, when said sales are made by the producer, or members of his immediate family, or employees selling such products for the producer, in the original state or condition of preparation for sale at the place of production, and before such products are subjected to any other process coming within a class of business, the privilege of conducting which is taxed by the provisions of this act.

(i) Amounts received from sales to public schools, when such schools are supported wholly or in part by funds provided by the State of Mississippi.

(j) The gross proceeds of retail dealers in mules, horses and other livestock.

(k) The gross proceeds of sales of coffins, caskets, and other materials used in the preparation of human bodies for burial.

(l) The gross proceeds of sales of vessels or barges of fifty (50) tons load displacement and over, when sold by the manufacturers or builders thereof.

Section 5. (10117) **Returns, Monthly, etc.**--The taxes levied hereunder shall be due and payable on or before the 15th day of the month next succeeding the month in which the tax accrues. The taxpayer shall, on or before the 15th day of each month, make out and mail a return, showing the amount of the tax for which he is liable for the preceding month, together with a remittance in the form required by Section 13 of this act, for the amount of the tax, to the office of the Commissioner. Such monthly return shall be signed by the taxpayer or a duly authorized agent of the taxpayer, but need not be verified by oath. Providing that persistent or wilful failure to make any return and pay the tax shown thereby to be due, by the time specified herein, there shall be added to the amount of tax shown to be due, ten per cent damages.

Provided, however, that when the total tax for which any person is liable under this act, does not exceed the sum of ten dollars ($10.00) for any month, a quarterly return and remittance in lieu of the monthly return may be made on or before the 15th day of the month next succeeding the end of the quarter for which the tax is due.

Provided further that when any taxpayer whose liability for taxes exceeds $10.00 per month, desires to make quarterly returns in lieu of the monthly returns herein required, if such taxpayer shall make application to the Commissioner for such privilege, the Commissioner may grant such privilege upon the execution and filing by the taxpayer with the Commissioner a good and solvent bond with some surety company authorized to do business in Mississippi as surety thereon in an amount double the ag-

gregate tax paid by such taxpayer for any previous three months period within the last calendar year. Said bond to be conditioned for the prompt payment of such taxes as may be due for each such quarterly period.

Provided, however, that any person taxable under this act, having cash and credit sales, may report such cash and credit sales separately, and upon making application therefor may obtain from the Commissioner an extension of time for the payment of taxes due on account of such credit sales. Such extension shall be granted by the Commissioner, under such rules and regulations as the Commissioner may prescribe. When such extension is granted, the taxpayer shall thereafter include in each monthly report all collections made during the month next preceding, and shall pay the taxes due thereon at the time of filing such report.

Provided, however, that any person taxable under this act, having cash and credit sales, and who reports such credit sales before collection thereof has been made, may take credit on subsequent returns or reports for bad debts actually charged off, if such amounts charged off have previously been included in gross income or gross proceeds of sales, as the case may be, and the tax paid thereon. Provided, however, that any amounts subsequently collected on accounts that have been charged off as bad debts, shall be included in the subsequent reports.

Provided, however, that in cases where an extension of time for the payment of taxes due on account of such credit sales shall be granted by the Commissioner and the taxpayer shall thereafter discontinue the business in relation to which such extension of time shall have been granted, such taxpayer shall be required to file with the Commissioner within ten days, or such further time as the Commissioner may direct, from the date of the dis-

continuance of such business, a special report showing the amounts of such credit sales which have not been included in determining the measure of the tax theretofore paid and such other information with reference to such credit sales as the Commissioner may require; and the Commissioner shall thereupon investigate the fact with reference to such credit sales and the condition of the accounts therefor, and shall determine, from the best evidence available, the value of all notes, open accounts or other evidence of debt arising out of such credit sales; and the value of such notes, open accounts and other evidence of debt, as thus determined by the Commissioner, shall be used in determining the amount of the tax for which such taxpayer shall be deemed to be liable on account of such credit sales. When the amount of such tax shall have been ascertained in the manner herein provided the taxpayer shall be required to pay the same within ten days or such further time as the Commissioner may allow, notwithstanding the fact that such notes or accounts may still remain uncollected.

The monthly, quarterly, and annual returns required under this act shall be made upon forms to be prescribed by the Commissioner.

The Commissioner for good cause may extend the time for making any return required under the provisions of this act, and may grant such reasonable additional time within which to make such return as he may deem proper, but the time for filing any such return shall not be extended beyond the 15th of the month next succeeding the regular due date of such return.

Section 6. (10118) **Annual Returns, When, How Made** —On or before thirty days after the end of the tax year, each person liable for the payment of a privilege tax un-

der Section 2 and succeeding sections of this act shall make a return showing the gross proceeds of sales, or gross income of business, and compute the amount of tax chargeable against him in accordance with the provisions of this act, and deduct the amount of monthly or quarterly payments (as hereinbefore provided), and transmit with his report a remittance in the form required by Section 13 of this act covering the residue of the tax chargeable against him to the office of the Commissioner; such return shall be verified by the oath of the taxpayer, if made by an individual, or by the oath of the president, vice-president, secretary or treasurer of a corporation, if made on behalf of a corporation. If made on behalf of a partnership, joint adventure, association, trust, estate, or in any other group or combination acting as a unit, any individual delegated by such firm, co-partnership, joint adventure, association, trust, estate, or any other group or combination acting as a unit shall make the oath on behalf of the taxpayer. If for any reason it is not practicable for the individual taxpayer to make the oath, the same may be made by any duly authorized agent. The Commissioner for good cause shown may extend the time for making the annual return on the application of any taxpayer and may grant such reasonable additional time within which to make the same as may, by him, be deemed advisable.

Section 7. (10119) **Commissioner to Correct Error**—As soon as practicable after the return is filed the Commissioner shall examine it; if it then appears that the correct amount of tax is greater or less than that shown in the return, the tax shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the tax so recomputed, the excess so paid shall be credited against the subsequent liability; and if the amount already paid exceeds the correct amount of the tax,

and the taxpayer has discontinued business, and there is no subsequent liability upon which such excess may be credited, or if the amount of the excess so paid shall exceed the subsequent liability for a period of twelve months, the excess shall be refunded to the taxpayer in accordance with the provisions of this act.

If the amount already paid is less than the amount which should have been paid, the difference to the extent not covered by any credits under this act shall be paid upon notice and demand by the Commissioner.

If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof but without intent to defraud, there may be added as damages ten per cent for the first offense, twenty-five per cent for the second offense, and fifty per cent for any subsequent offense of the total amount of the deficiency in the tax, and said damages shall become due and payable upon notice and demand by the Commissioner.

If any part of the deficiency is due to fraud with intent to evade the tax, then there shall be added as damages twenty-five per cent for the first offense and fifty per cent for any subsequent offenses of the total amount of the deficiency in the tax, and in such a case the whole amount of tax unpaid, including charges so added, shall become due and payable upon notice and demand by the Commissioner and an aditional one per centum per month on the tax may be added from the date such tax was due until paid.

The amount of taxes due under any return made hereunder or any return made or due under this act or any amendments thereto shall be determined and assessed within three years from the date such return was filed,

and no suit or other proceedings for the collection of any taxes due shall be begun after the expiration of three years from the date such return was filed; but nothing herein shall affect or defeat any claim, assessment, suit, appeal, right or cause of action for taxes due prior to the adoption of this act, whether the assessment, suit, appeal or claim therefor shall have been begun before its adoption or shall hereafter be begun; provided, that in the case of a false or fraudulent return with the intent to evade tax or a failure to file a required return, the amount of tax due may be determined, assessed and collected, and suit or proceedings for the collection of such an amount may be begun at any time after it becomes due.

A taxpayer may apply to the Commissioner for revision of the tax assessed against him, or paid by him, at any time within three years from the date of the assessment, or from the time of filing of the return. Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed, or assessment made, no credit or refund shall be allowed.

Section 8. (10120) **Taxpayer Must Keep Records—Failure to Make Returns—Duty and Power of Commissioner**—It shall be the duty of every person engaging or continuing, in this state, in any business for which a privilege tax is imposed by this act to keep and preserve adequate records of the gross income, gross receipts or gross proceeds of sales of such business and such other books or accounts as may be necessary to determine the amount of tax for which he is liable, under the provisions of this act, which said records shall be adequate in substance rather than form, to conform to the requirements and regulations promulgated by the Commissioner; and all of such records shall be written in the English language. And it shall be the duty of every such person to keep and pre-

serve, for a period of two years, all invoices of goods and merchandise purchased or sold for resale, and all such books, invoices and other records shall be open for examination at any time, by the Commissioner or his duly authorized agent.

The records provided for in this section shall be kept at the taxpayer's principal place of business within this state, and failure to keep such records shall subject the person so failing to all the penalties of this act.

If adequate records of the gross income, gross receipts or gross proceeds of sales are not maintained or invoices preserved as provided herein, or if an audit of the records of a taxpayer discloses that additional taxes are due and unpaid the Commissioner may make additional returns and assessments from the best information available, and shall give notice by registered mail of such returns and assessments, and such returns and assessments shall be prima facie correct for the purpose of this act, and the amount of tax shown due thereby shall be a lien against all the property of the taxpayer until discharged by payment and if such tax be paid within ten days after notice by the Commissioner, then there shall be added ten per centum as damages for the first offense, twenty-five per cent for the second offense and fifty per cent for any subsequent offense, and interest at the rate of one per centum per month from the time such tax was due until paid. If payment be not made within ten days after demand therefor by the Commissioner, there may be added twenty-five per cent for the first offense and fifty per cent for subsequent offenses as damages together with interest at the rate of one per centum per month on the tax from such time such tax was due. Provided, however, in the event such taxpayer, within ten days from the date of such notice, shall by petition in writing state that said return is incorrect, the

Commissioner shall grant a hearing on such petition and investigate that question fully before proceeding further under this section.

If no return is made by any taxpayer required to make returns as provided herein, the Commissioner shall give written notice by registered mail to such taxpayer to make such returns within ten days from the date of such notice and if such taxpayer shall fail or refuse to make such returns as he may be required to make in such notice, then such returns shall be made by the Commissioner from the best information available, and such returns shall be prima facie correct for the purposes of this act, and the amount of tax shown due thereby shall be a lien against all the property of the taxpayer from the date the amount thereof is determined to be due until discharged by payment, and if such tax be paid within ten days after notice by the Commissioner, then there shall be added ten per centum as damages for the first offense, twenty-five per cent for the second offense, and fifty per cent for any subsequent offense, and interest at the rate of one per centum per month from the time such tax was due until paid. If payment be not made within ten days after demand therefor by the Commissioner there shall be added twenty-five per cent for the first offense and fifty per cent for subsequent offenses, as damages together with interest at the rate of one per centum on the tax from the time such tax was due. Provided, however, in the event such taxpayer in answer to said notice from the Commissioner shall state by petition in writing that he is not required under the law to make such returns, the Commissioner shall grant a hearing on such petition and investigate that question fully before proceeding further under this section.

Section 9. (10121) **Tax Shall Be Lien**—The tax imposed by this act shall be a lien upon the property of any

person subject to the provisions hereof, who shall sell out his business or stocks of goods, or shall quit business, and such person shall be required to make out the return provided for under Section 6 within ten days after the date he sold out his business or stock of goods, or quit business, and pay the tax imposed by Section 2-c, and the purchaser or his successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said taxes due and unpaid until such time as the former owner shall produce a receipt from the Commissioner showing that the taxes have been paid, or a certificate that no taxes are due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided and the taxes shall be due and unpaid after the ten days period allowed, he shall be personally liable for the payment of the taxes accrued and unpaid on account of the operation of the business by the former owner. And the property sold or transferred may be proceeded against in the hands of the purchaser or transferee as though no sale or transfer had been made; and where premises are equipped with permanent fixtures so that no other commodity than that sold by the owner of said premises can be sold or handled thereat; and the nature of the commodity sold is such that an amount thereof sufficient to cover the tax accrued for one month is not kept on hand at any one time; and such premises are leased or rented by the owner to persons who do not pay all taxes accrued on account of the business conducted on such premises when due; then such place of business, including fixtures used in such business, shall be liable to seizure and sale under a warrant issued by the Commissioner, when such taxes accrued upon business conducted upon such premises becomes due and unpaid.

Section 10. (10122) **Aggrieved Person May File Petition.** If any person having made a return and paid taxes

thereon feels aggrieved by the additional assessment made upon him for any year by the Commissioner he may apply to the Tax Commission by petition, in writing, within ten days after notice is mailed to him, for a hearing and a correction of the amount of the tax assessed upon him by the Commissioner, in which petition he shall set forth the reasons why such hearing should be granted and the amount in which such tax should be reduced. The Tax Commission shall promptly consider such petition, and shall grant such hearing notifying the petitioner of the time and place fixed for such hearing. After such hearing, the Tax Commission may make such order in the matter as may appear to it just and lawful, and shall furnish a copy of such order to the petitioner. Any person improperly charged with any tax and required to pay the same, may recover the amount paid, together with interest, in any proper action or suit against the Commissioner, and the Circuit Court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to recover any tax improperly collected.

Provided, however, that in any such suit, the plaintiff must allege and prove that he alone bore the burden of the tax sued for, and did not directly or indirectly collect the tax from his customers. It being the declared purpose of this section to make certain that any taxes refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief, and is therefore the real party in interest. It shall not be necessary for the taxpayer to protest against the payment of the tax or to make any demand to have the same refunded in order to maintain such suit. In any suit to recover taxes paid or to collect taxes the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

Provided, further, that all suits to recover taxes under this section, shall be filed within three years next after the time of payment of such taxes.

Either party to such suit shall have the right to appeal to the Supreme Court of Mississippi as now provided by law. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, then it shall be the duty of the State Auditor, upon receipt of a certified copy of such final judgment to issue a warrant directed to the State Treasurer in favor of such taxpayer to pay such judgment, interest and costs. It shall be the duty of the State Treasurer to honor such warrant and pay such judgment out of any funds in the state treasury.

No injunction shall be awarded by any court or judge to restrain the collection of the taxes imposed by this act, or to restrain the enforcement of this act. The provisions of Section 420, Code of 1930, shall not apply to taxes imposed by this act.

It shall be the duty of an attorney for the commission or Commissioner or the Attorney General to represent the commission, the Commissioner, or any agent or employee, or the State of Mississippi in all legal matters relating to the enforcement, construction, application and administration of this act, and in any litigation which may be instituted by the commission or Commissioner and in which they or either of them may become involved, upon the order and under the direction of the Commissioners.

Section 11. (10123) **Warrant for Collection of Tax.**— If any tax imposed or any portion of such tax be not paid within ten days after the same has been determined to be due by the Commissioner, and the taxpayer has been given ten days written notice by registered mail of such determination of the taxes due, the Commissioner may

issue a warrant under official seal directed to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the person owning the same found within his county, for the payment of the amount thereof, with damages, to the amount of ten per cent of the tax, in addition to the penalties imposed for failure to make a proper return, or for making a fraudulent return and interest, and cost of executing and enrolling the warrant, and to return such warrant to the Commissioner and pay to him the money collected by virtue thereof by a time to be therein specified not more than sixty days from the date of the warrant. The sheriff shall within five days after the receipt of the warrant, file with the circuit clerk of his county a copy thereof, and thereupon the circuit clerk shall enter in the judgment roll in the column for judgment debtors, the name of the taxpayer mentioned in the warrant, and in appropriate column, the amount of the tax, or portion thereof and damages for which the warrant is issued; and the day when such copy is filed; and thereupon the amount of such warrants so docketed shall be and remain a lien upon the title to and interest in real and personal property, including choses in action, except negotiable instruments not past due, of the person against whom it is issued in the same manner as a judgment duly enrolled in the office of such clerk. The sheriff thereupon shall levy upon any property of the taxpayer, including negotiable instruments, in all respects, with like effect, and in the manner prescribed by law in respect to executions issued against property upon judgments or attachment proceedings, of a court of record and the remedies by garnishment shall apply and the officer shall be entitled to the same fees for his services in executing the warrant as now allowed by law for like services, to be collected in the same manner as now provided by law for like services.

(10124) **Jeopardy Assessment and Warrant.**—If the Commissioner has just cause to believe and believes the collection of taxes due by any taxpayer will be jeopardized by delay, he may assess such taxes immediately, together with interest or other amounts provided by this act, and may immediately issue a jeopardy warrant under official seal directed to the sheriff of any county of this state. The sheriff shall immediately upon receipt of the warrant file with the circuit clerk of his county a copy thereof, and thereafter both the circuit clerk and the sheriff shall proceed in accordance with the provisions of paragraph 1 of this section.

If any sheriff shall fail to execute, file with the circuit clerk of the county for enrollment on the judgment roll, and return any warrant directed to him as herein provided on the return day thereof, the State of Mississippi shall be entitled to recover judgment against the sheriff and the sureties on his official bond for the amount of the warrant, and all costs, with lawful interest thereon until paid, together with ten per cent of the full amount of judgment for damages, to be recovered by a suit against the sheriff and his sureties by the Attorney General at the request of the Commissioner.

The tax due and unpaid under the provisions of this act shall constitute a debt due the state and it shall constitute a lien upon all the property of the taxpayer, and the same may be collected by an action in debt or other appropriate judicial proceeding, which remedies shall be in addition to all other existing remedies.

Any person liable for a tax under the provisions of this act on account of engaging or continuing in this state in any business who failed to obtain a license from the Commissioner as provided in Section 3 of this act, or after

such license has been revoked, or who fails to make his returns for taxation as provided in Section 6 of this act, or who fails to keep adequate records and invoices provided by Section 8 of this act, or fails or refuses to permit inspection of such records, or who fails to pay any taxes when due under the provisions of this act, shall forfeit his rights to do business in this state until he complies with all the provisions of this act and until he enters into a bond, with sureties, to be approved by the Commissioner, in an amount not to exceed all taxes estimated to become due by said person under the provisions of this act for any three months period, conditioned to comply with the provisions of this act, and pay all taxes legally due by him, and it shall be the duty of the Attorney General, when he shall have received notice from the Commissioner that any person is engaged in or continuing in this state in any business without obtaining such license, or after such license has been revoked, or without keeping and allowing inspection of all records required by this act, or without making such return, or returns, and without paying all taxes due by him under the provisions of this act, to proceed by injunction to prevent the continuance of said business, and any temporary injunction enjoining the continuance of such business shall be granted without notice by any judge or chancellor now authorized to grant injunctions.

Section 12. (10125) **Calendar or Fiscal Year Annual Return**—The assessment of taxes herein made and the returns required therefor shall be for the year ending on the 31st day of December; provided, however, that if the taxpayer in transacting his business, keeps the books reflecting the same on a basis other than the calendar year, he may, with the assent of the Commissioner, make his annual returns and pay taxes for the year covering his

accounting period, as shown by the method of keeping the books of his business.

Section 13. (10126) **Is Additional Tax.**—The tax imposed by this act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder, except as in this act otherwise specifically provided. But no municipality or levee district shall be authorized to levy any tax by virtue of the provisions of this act.

Remittances—How Made. All remittances of taxes imposed by this act shall be made to the Commissioner by bank draft, check, cashier's check, money order, or money, who shall issue his receipts therefor to the taxpayer, when requested, and shall deposit all moneys received in some bank or banks in this state, qualified as a state depository; provided, no remittance other than cash shall be final discharge of liability for the tax herein assessed and levied unless and until it has been paid in cash to the Commissioner.

Section 13-A. (10127) **Settlement With Treasury.** On or before the fifteenth day of each month the amount received from taxes levied under the provisions of this act during the preceding month shall be paid and distributed as follows:

(a) One-tenth (1/10) of the total amount of taxes collected under the provisions of this act during the preceding month shall be deposited in the state treasury to the credit of a special fund designated as the "Division of State Aid Road Construction" created by Senate Bill No. 1 of the extraordinary session of the legislature of 1949. It being the purpose of this act to pay into said special fund the approximate amount of sales taxes collected on the sales of automobiles, trucks and tractors.

(b) An additional amount which shall be equivalent to one-half cent (½¢) per gallon upon the total net gallonage of gasoline (or motor vehicle fuel other than gasoline) upon which the state gasoline or motor vehicle fuel tax is paid during the preceding month as shown by reports filed with the motor vehicle comptroller as required by Section 7, Chapter 264, Laws of 1946, as now or hereafter amended, shall likewise be deposited in the state treasury to the credit of said special fund designated as the "Division of State Aid Road Construction." For the purpose of this subsection the motor vehicle comptroller shall furnish the commissioner with a monthly certificate showing the total net gallonage of gasoline or other motor vehicle fuel upon which the state tax was paid during the preceding month, which certificate shall be furnished on or before the fifth day of each month.

The term "net gallonage" as used in this subsection shall mean the total number of gallons of gasoline or other motor fuel reported to the Motor Vehicle Comptroller during the preceding month as being liable for the state tax less the number of gallons upon which the state tax is refunded in whole or in part during such month, either by direct refund or by credit on tax liability.

(c) The remainder of the amounts collected under the provisions of this act shall be paid into the state treasury to the credit of the general fund.

From said amount of taxes paid into said special fund under subsections (a) and (b) hereof, there shall first be deducted and paid the amounts necessary to pay the expenses of the Division of State Aid Road Construction, such expenses not to exceed $50,000.00 per annum.

From the remainder of said funds there shall first be allocated to each county monthly the sum of eight hundred

thirty-three dollars and thirty-three cents ($833.33) and the balance remaining shall be allocated to the several counties in the following percentages:

County	Per Cent	County	Per Cent
Adams	0.89	Lowndes	0.96
Alcorn	0.94	Madison	1.47
Amite	1.71	Marion	1.38
Attala	1.48	Marshall	0.92
Benton	0.84	Monroe	1.03
Calhoun	1.38	Montgomery	1.08
Carroll	1.29	Neoshoba	1.62
Chickasaw	0.97	Newton	1.22
Choctaw	0.98	Noxubee	1.36
Claiborne	1.03	Oktibbeha	0.9
Clarke	1.59	Clay	0.87
Hinds	1.80	Coahoma	1.46
Holmes	1.91	Copiah	1.90
Humphreys	0.93	Covington	1.12
Issaquena	0.45	DeSoto	0.87
Itawamba	1.36	Forrest	1.15
Jackson	0.99	Franklin	1.71
Jasper	1.32	George	0.86
Jefferson	0.95	Greene	1.77
Jefferson Davis	0.85	Grenada	0.85
Jones	1.79	Hancock	0.77
Kemper	1.64	Harrison	1.45
Lafayette	1.22	Panola	1.55
Lamar	0.93	Pearl River	1.30
Lauderdale	1.80	Perry	1.23
Lawrence	1.12	Pike	1.30
Leake	1.25	Pontotoc	0.80
Lee	1.05	Prentiss	1.14
Leflore	1.29	Quitman	0.85
Lincoln	1.86	Rankin	1.46

County	Per Cent	County	Per Cent
Scott	1.20	Union	1.03
Sharkey	0.63	Walthall	1.00
Simpson	1.41	Warren	0.85
Smith	1.38	Washington	1.62
Stone	0.85	Wayne	1.76
Sunflower	1.77	Webster	1.19
Tallahatchie	1.27	Wilkinson	0.96
Tate	0.72	Winston	1.25
Tippah	1.24	Yalobusha	0.75
Tishomingo	0.98	Yazoo	1.72
Tunica	1.04		

Section 13-b. (10128) **Auditor to Check Books**—At the end of each month the Auditor shall carefully check the books and records of the Commissioner and his accounts with the bank or banks and shall verify the amounts paid or to be paid into the state treasury. Any duty herein required of the Auditor may be performed by an inspector employed under the provisions of Section 3747 of the Mississippi Code of 1930.

Section 13-c. (10129) **Records**—The Commissioner shall keep full and accurate records of all moneys received by him, and how disbursed; and shall preserve all returns filed with him under sections 5 and 6 of this act for a period of three years.

Section 14. (10130) **Information In Files Not To Be Divulged.**—Unless in accordance with the judicial order or as herein provided, the members of the State Tax Commission, its agents, clerks or stenographers, shall not divulge the gross income, gross proceeds of sales or the amount of tax paid by any person as shown by the reports filed under the provisions of Sections 5 and 6 of this act, except to members and employees of the State

Tax Commission and the income tax department thereof, for the purpose of checking, comparing and correcting returns, or to the Governor or to the Attorney General, or any other legal representative of the State in any action in respect to the amount of tax due under the provisions of this act.

Section 14-a. (10131) **Duty of Secretary of State**—The Secretary of State shall withhold the issuance of any certificate of dissolution or withdrawal in the case of any corporation organized under the laws of this state or organized under the laws of another state and admitted to do business in this state until the receipt of a notice from the Commissioner to the effect that the tax levied under this act against any such corporation has been paid, if any such corporation is a taxpayer under the law, or until he shall be notified by the Commissioner that the applicant is not subject to pay a tax hereunder.

Section 15. (10132) **Unlawful to Refuse to Make Returns—Penalty.**—It shall be unlawful for any person to engage or continue in any business for which a tax is imposed by this act without procuring a license as required by Section 3 of Chapter 119, Laws of 1934, as amended herein, or after such license has been revoked, or who shall fail or refuse to make the return provided to be made in Sections 5 and 6 of this act or to make any false or fraudulent return or false statement in any return, with intent to defraud the state or to evade the payment of the tax or any part thereof, imposed by this act; or for any person to aid or abet another in any attempt to evade the payment of the tax, or any part thereof, imposed by this act; or for the president, vice-president, secretary or treasurer of any company to make or permit to be made for any company or association any false return, or any

false statement in any return required by this act with the intent to evade the payment of any tax hereunder; or for any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the Commissioner, or his duly appointed agent, as required by this act; or to fail or refuse to permit the inspection or appraisal of any property by the Commissioner or his duly appointed agent, or to refuse to offer testimony or produce any record as required by this act; or for any person using the public roads and highways of this state for the transportation of merchandise for sale, other than a common carrier having a permanent office in this state where proper records of merchandise transported are kept, and produced for inspection by the Commissioner or his agents, to fail to have in his or her possession at all times while such merchandise is being transported, and allow inspection of, the invoices or sales tickets required by Section 18 of this act. Any person violating any of the provisions of this act shall be guilty of a misdemeanor and on conviction thereof shall be fined not more than five hundred dollars ($500.00) or imprisoned not exceeding six months in the county jail, or punished by both such fine and imprisonment, at the discretion of the court within the limitations aforesaid. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent statement, with the intent aforesaid shall be guilty of the offense of perjury and, on conviction thereof, shall be punished in the manner provided by law. Any company for which false return, or return containing a false statement as aforesaid shall be made, shall be guilty of a misdemeanor and may be punished by a fine of not more than five hundred dollars ($500.00).

Section 16. (10133) **Administration of Act Vested in Chairman of the State Tax Commission.** The administration of this act is vested in and shall be exercised by the chairman of the State Tax Commission, except as otherwise herein provided, and the enforcement of any of the provisions of this act in any of the courts of the state shall be under the exclusive jurisdiction of the chairman of the State Tax Commission who may require the assistance of and act through the Attorney General, prosecuting attorney of any county, or any district attorney, or any attorney for the commission, and may with the assent of the Governor, employ special counsel in any county to aid the prosecuting attorney, the compensation of whom shall be fixed by and paid only upon the approval of the Governor; but the Attorney General, district attorney or prosecuting attorney of any county shall receive no fees or compensation for services rendered in enforcing this act in addition to the salary paid to such officer. The chairman of the State Tax Commission shall appoint, as needed, such deputies, agents, clerks and stenographers as authorized by law, who shall serve under him and shall perform such duties as may be required by the Commissioner, including the signing of notices, warrants and such other documents as may be specifically designated by the Commissioner, not inconsistent with this act, and they are hereby authorized to act for the Commissioner, as he may prescribe and as provided herein. Each such agent shall execute a bond in the sum of five thousand dollars ($5,000.00) for the faithful discharge of his duties. All of such agents, clerks and stenographers may be removed by the Chairman of the State Tax Commission for cause of which the Commissioner shall be the final judge.

In case of violation of the provisions of this act the Commissioner may decline to prosecute for the first of-

fense, if in his judgment such violation is not wilful or flagrant.

Section 17. (10134) **Commissioner to Make Regulations**—The Commissioner shall from time to time promulgate such rules and regulations not inconsistent with this act for making returns and for the ascertainment, assessment and collection of the tax imposed hereunder as he may deem necessary to enforce its provisions; and upon request shall furnish any taxpayer with a copy of such rules and regulations.

All forms, necessary for the enforcement of this act, shall be prescribed, printed and furnished by the Commissioner.

The Commissioner may adopt rules and regulations providing for the issuance of permits to manufacturers to purchase tangible personal property without the payment to the vendor of the Sales tax and/or Use tax, and providing for such manufacturer to report and pay such tax directly to the Commissioner, in instances where the Commissioner determines that such provisions will facilitate and expedite the collection of the tax at the proper rates which may be due on such purchases by the manufacturer.

Section 18. (10135) **Commissioner or Agent May Examine Books, Etc.**—The Commissioner or his authorized agent may examine any books, papers, records, or other data bearing upon the correctness of any return, or all returns, or for the purpose of making a return, or returns, where none has been made as required by Sections 5 and 6 of this act, including the records of any common carrier, bank, wholesale or retail dealer in any kind of merchandise, doing business in this state, whether in regard to his own or another's return, and may require the attendance of any person and take his testimony with respect to any

such matter, with power to administer oaths to such person or persons. Any person using the public roads and highways of this state for the transportation of merchandise of any kind to be sold in this state, whether such person is operating as a common carrier, contract carrier or operating a private vehicle, while so engaged in the transportation of such merchandise, must have in his or her possession while so engaged, invoices or delivery tickets correctly disclosing the nature and quantity of such merchandise, the consignor and consignee of each and every item of such merchandise being transported. Provided, that common carriers operating under the supervision of the Interstate Commerce Commission, or the Mississippi Supervisors of Common Carriers, and having and maintaining a permanent office or place of business in this state, where correct and complete records of all merchandise transported into this state are kept, shall not be required to have in the immediate possession of the person in charge of the vehicle in which such merchandise is being transported, such invoices or delivery tickets, but the records of such common carriers shall be open to the inspection of the Commissioner, or his authorized agents, at all reasonable times, for the purpose of obtaining information with reference to all merchandise transported into the state for sale. In the case of any vehicle engaged in the transportation of merchandise for sale, not belonging to nor operated by common carriers so supervised, nor keeping complete records in this state open to inspection by the Commissioner, the Commissioner or his authorized representatives or agents, may examine any invoices or sales tickets carried by the person in charge of such vehicle, and compare same with the merchandise being transported, for the purpose of ascertaining whether or not the provisions of law are being complied with, the character and quantity of merchandise being so transported, and the con-

signor and consignee thereof, in aid of the proper administration of this act. The absence of such invoices or delivery or sales tickets indicating to whom said merchandise belongs, or is to be delivered, in the hands of such person so engaged in transporting of merchandise, shall be prima facie evidence that such person is so transporting such merchandise in violation of this act and liable to a penalty of $25.00 for each such offense, which said penalty may be assessed and collected by the Commissioner or his duly authorized agent, and subject to all the provisions of this act. If any person summoned as a witness shall fail to obey any summons to appear before the Commissioner or his authorized agent, or shall refuse to testify or answer any material question or to produce any book, record, paper or other data when required to do so, such failure or refusal shall be reported to the Attorney General, the district attorney or county attorney, who shall thereupon institute proceedings in the circuit court of the county where such witness resides to compel obedience to any summons of the Commissioner, or his authorized agent. Said proceedings to be by petition for citation to such person refusing to obey such summons, to show cause why such person should not be required to obey such summons; and the circuit judge of the district may hear such petition in term time or vacation upon two days' notice to the person sought to be cited; and the circuit judge may enter such order as he may deem proper, and punish any failure to comply with such order as for any other contempt of said court. Officers who serve summonses or subpoenas, and witnesses attending, shall receive like compensation as officers and witnesses in the justice of the peace courts; to be paid from the proper appropriation for the administration of this act.

Section 19. (10137) **Excess Payment May Be Refunded**—If upon examination of any monthly or quarterly return made under this act, it appears that an amount of tax has been paid in excess of that properly due, then the amount in excess shall be credited against any tax or installment thereof then due from the taxpayer, under any subsequent monthly or quarterly return; and if upon examination of any annual return it appears that an amount of tax has been paid in excess of that properly due, such excess may be credited upon any amount due under any subsequent return of such taxpayer, during any succeeding years, or in the event that the taxpayer does not continue in business and has no subsequent liability for such tax, or prefers to obtain a refund of such excessive payment of taxes before any subsequent liability for such taxes accrues, such overpayment may be refunded as provided by Section 3276 of the Mississippi Code of 1930; and the Commissioner shall issue to such taxpayer, upon request, a certificate of overpayment, which certificate shall be sufficient evidence to support a claim for the refund of such amount of overpayment. Any taxes recovered by suit by any taxpayer may be refunded in like manner, but such claim shall be accompanied by a copy of the order, judgment or decree of the court in which such recovery was had by the taxpayer.

Section 20. (10138) **Prior Rights or Actions Not Affected by This Act**—Nothing in this act shall affect or defeat any claim, assessment, appeal, suit, right or cause of action for taxes due, under the Emergency Revenue Act of 1932, or the Revenue Act of 1930, prior to the date on which this act becomes effective, whether such assessments, appeal, suits, claim or action shall have been begun before the date on which this act becomes effective, or shall thereafter be begun; and the sections of the Emergency

Revenue Act of 1932, or the Revenue Act of 1930, amended or repealed by this act are expressly continued in full force, effect and operation for the purpose of the assessment and collection of any taxes due under any such laws prior to the date on which this act becomes effective, and for the imposition of any penalties, forfeitures or claims for a failure to comply therewith.

Section 21. (10139) **Invalidity of Part of Act Not to Invalidate Entire Act**—If any clause, sentence, paragraph or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Section 22. (10140) **Conflicting Laws Repealed**—That Chapters 90 and 91, Laws of Mississippi, 1932, being an act imposing a privilege tax on gross income and gross proceeds of sales, be the same are hereby repealed.

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NO. 385

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

DUNN BROS., INC. ..... Appellant

vs.

A. H. STONE, CHAIRMAN,
STATE TAX COMMISSION,
REVIVED AS ALEX McKEIGNEY,
CHAIRMAN OF STATE TAX
COMMISSION ..... Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment of the Supreme Court of Mississippi be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

I.

STATEMENT OF FACTS AND ISSUES ON APPEAL

This is an appeal from a decision rendered by the Supreme Court of the State of Mississippi on the 13th day of June, 1955, and reported in Southern Reporter

Advance Sheet 80 So. (2d) 802, holding the appellant not entitled to refund for taxes paid the State of Mississippi on gross income earned from transportation within the State. Suggestion of Error was overruled on the 15th day of July, 1955, and reported in Southern Reporter Advance Sheet 81 So. (2d) 712.

Appellant, a Texas corporation, did not qualify to do business in the State of Mississippi; never maintained an office therein and owned no property in the State of Mississippi other than that which was used in the performance of the work involved in this suit and which property was removed therefrom upon the completion of appellant's contract. Its business consisted of the transporting and stringing of steel pipe used in the construction of pipe lines.

During the fiscal year, June 1, 1950, to May 31, 1951, the Tennessee Gas Transmission Company was constructing a gas pipe line which extended through several states, and particularly through the State of Mississippi. In furtherance of its work the company ordered steel pipe, for this particular job, from a foundry in California, which pipe was shipped by rail from the foundry to the nearest railroad station in Mississippi to be then transported to the right-of-way of the pipe line where the particular pipe was to be used. When the pipe arrived at the railroad station to which it was billed, it was inspected by agents of the Tennessee Gas Transmission Company, accepted by it and turned over to appellant for transportation from the railhead to the pipe line right-of-way. In all bills of lading involved herein the Tennessee Gas Transmission Company was both the consignor and consignee. The contract for the transportation between Tennessee Gas Transmission Company

and appellant was entered into prior to the time of the original shipment.

The case was tried on pleadings and "Agreed Statement of Facts", none of which, it might be added refer to the Carmack Amendment upon which appellant places great reliance in its Jurisdictional Statement, nor is there any statement or intimation in either the pleadings or the Agreed Statement of Facts that the appellant, in any instance, transported pipe across the state line from railhead in Mississippi, as set forth in the Jurisdictional Statement, even though said Jurisdictional Statement states that no tax was demanded in such instances. The State of Mississippi, acting through appellee's predecessor, imposed and collected a two per cent tax on the gross income derived from such transportation under the provisions of *Section* 10109, *Mississippi Code of* 1942 (*Recompiled*), and this suit was brought for refund of such tax.

II.

ARGUMENT

A SUBSTANTIAL FEDERAL QUESTION IS NOT PRESENTED IN THIS CASE

A federal question does not arise when a state court holds that a statute applies only to domestic transportation.

Erie R. Co. v. Purdy, 185 *U. S.* 148.

This does not mean that appellee denies the right of this court to determine for itself what is interstate commerce, but this court has held that it is bound by the construction which a state court places on its own statutes.

Memphis Natural Gas Company v. Stone, 335 *U. S.* 80, 84, 85.

Aero Mayflower Transit Co. v. Board of R. R. Comrs., 332 *U. S.* 495, 499, 500.

This was even true in the case of *Spector Motor Co. v. O'Connor*, 340 *U. S.* 602, wherein this court accepted, as its basic predicate, the construction placed upon the statute involved by the highest Court of Connecticut, which held that the tax was levied upon the right to do interstate business. The Supreme Court of Mississippi has previously held that the incidence of the tax under the statute involved in this case was upon intrastate business.

Interstate Oil Pipe Line Co. v. Stone, 203 *Miss.* 715, 729, 35 *So.* (2*d*) 73, *affirmed* 337 *U. S.* 662:

> "Hence, the statute was designed only for the purpose of taxing the privilege of operating a pipe line for transporting the oil from one point to another in the state . . ."

(A)

THE INCIDENCE OF APPELLANT'S TAX WAS INTRASTATE TRANSPORTATION

Interstate commerce must have a beginning and an ending. The interior movement of goods does not constitute interstate commerce.

Coe v. Errol, 116 *U. S.* 517, 528;

Interstate Commerce Commission v. Detroit G. H. & M. R. Co., 167 *U. S.* 633, 646;

New York ex rel Pennsylvania R. Co. v. Knight, 192 *U. S.* 21, 27;

Interstate Oil Pipe Line Co. v. Stone (*dissenting*), 337 *U. S.* 662, 675.

As a general rule an interstate journey begins when a passenger boards a train and ends when he disembarks

therefrom. Taxi transportation to and from the depot constitutes a local incidence and no part of interstate commerce.

United States v. Yellow Cab Co., 332 *U. S.* 218, 230, 231.

Whenever service is rendered wholly within a state it is presumed to be subject to state control and taxation, and the burden is on him who asserts the contrary.

New York ex rel Pennsylvania R. Co. v. Knight, 192 *U. S.* 21, 27.

The inspection of the shipment prior to acceptance by agents of the consignee was for their own benefit as set forth in the Jurisdictional Statement; therefore, was within itself a sufficient incident to terminiate the interstate transportation.

Bacon v. Illinois, 227 *U. S.* 504, 516.

The transportation taxed by the State of Mississippi was only that performed between termini wholly within the state, and no part of appellant's transportation was into another state. Appellant began its work only after the pipe had been transported by rail as close as possible to the pipe line right-of-way and delivery had previously been accepted by the consignee. If interstate commerce is to have an end and local haulage a beginning, this is it. The distinction between the two may take place even in a fleeting moment.

Southern Pacific Co. v. Gallagher, 306 *U. S.* 167, 177.

Local delivery of goods purchased from another state may furnish a sufficient incidence upon which to hang a state sales tax, and this is true regardless of the fact that interstate transportation was intended at the time of the sale.

McGoldrick v. Berwind-White Coal Co., 309 *U. S.* 33, 58.

Since the incidence of this tax is upon local or intrastate transportation, the fact that the contract for such transportation was negotiated outside the State of Mississippi is immaterial.

Department of Treasury of Indiana v. Wood Preserving Corporation, 313 *U. S.* 62, 67, 68.

Department of Treasury of Indiana v. Ingram-Richardson Mfg. Co., 313 *U. S.* 252, 254.

(B)

A STATE MAY TAX GROSS PROCEEDS OF INTERSTATE COMMERCE

The tax under this statute is exacted for the local protection afforded appellant.

Interstate Oil Pipe Line Co. v. Stone, 203 *Miss.* 715, 729, 35 *So.* (2*d*) 73.

Even interstate commerce may be made to pay a tax on its gross receipts so long as it is apportioned to the mileage in each particular state.

Central Greyhound Lines, Inc. v. Mealey, 334 *U. S.* 653, 663.

National Leather Co. v. Massachusetts, 227 *U. S.* 413, 423:

> "It is settled law that a state may lawfully impose upon a foreign corporation a tax for the privilege of doing business within its borders which is measured by the proportionate part of its gross receipts which are received within the state, Maine v. Grand Trunk R. Co., 142 U. S. 217, 228 . . ."

Apportionment presents no problem in this case for all of the transportation performed by appellant was within the taxing State of Mississippi.

There is no contention, nor can there be, that the rate is unfair or that the tax within itself is discriminatory.

The mere fact that appellant holds a Certificate of Convenience and Necessity from the Interstate Commerce Commission is insufficient within itself to grant tax exemption.

Stone v. Interstate Natural Gas Co., (*CCA*-5) 103 *Fed.* (2*d*) 544, 549:

"... It is clear also that because a matter is regulable only by one government it is not thereby exempted from just taxation by the other."

Even interstate commerce may be made to pay its way.

Postal Tel.-Cable Co. v. Richmond, 249 *U. S.* 252;

Western Live Stock v. Bureau of Revenue, 303 *U. S.* 250.

WHEREFORE PREMISES CONSIDERED, appellee prays that the appeal in this case be dismissed or that the judgment of the Supreme Court of the State of Mississippi be affirmed.

Respectfully submitted,

JOHN E. STONE
Attorney for Appellee

I, C. B. Snow, acknowledge receipt of copy of the above and foregoing Motion to Dismiss or Affirm, on this the 26 day of September, 1955.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 385.

DUNN BROS., INC., APPELLANT,

VS.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION, REVIVED AS ALEX McKEIGNEY, CHAIRMAN OF STATE TAX COMMISSION, APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS OR AFFIRM.

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellant files this brief opposing appellee's motion to dismiss or affirm.

STATEMENT OF THE CASE.

The statement of the facts contained in appellee's motion to dismiss or affirm, with one glaring exception, is substantially correct. For this reason, no statement is here made beyond what is deemed necessary to correct this obvious mistake on the part of appellee.

In appellee's statement of facts appears the following statement: "When the pipe arrived at the railroad station to which it was billed, it was inspected by agents of the Tennessee Gas Transmission Company, accepted by it and turned over to appellant for transportation from the railhead to the pipeline right-of-way." This is not a correct statement of the facts. Appellee, in this statement, is apparently adopting the language of the Mississippi Supreme Court. This language was never used by appellee in any of his briefs before the Mississippi Supreme Court and is a contradiction of the agreed statement of facts.

The agreed statement of facts in this case makes it clear that the inspection by Tennessee Gas Transmission Company at the end of the railroad portion of the journey was *not* for the purpose of accepting delivery or taking possession of the property so as to terminate the interstate transportation, but was solely *an inspection for the purpose of ascertaining whether the property had been damaged or lost during the railroad portion of the journey.* It is stipulated that the intention of Tennessee Gas Transmission Company in ordering the shipment of pipe from manufacturers located in the State of California was that the pipe be transported from the point of manufacture directly to the pipeline right-of-way within the State of Mississippi "by the most direct route available," and that the "various railheads within the State of Mississippi to which the pipe moved by railroad were never intended" by the shipper "to be the ultimate destination of the pipe" (R. 58).

With respect to the inspection at the end of the railroad portion of the journey, the agreed statement of facts is as follows (R. 59):

> "When the pipe arrived at the end of the railroad portion of the journey, within Mississippi, a

representative of the Tennessee Gas Transmission Company and a representative of the plaintiff would check the pipe while it was still on the rail cars, for the purpose of ascertaining the condition of the pipe, and to see if the pipe had suffered any damage in transit, or to determine whether any of the pipe had been lost in transit. The plaintiff would take possession of the pipe while it was still on the railroad cars and would unload the pipe from the rail cars."

The stipulation of facts also provides as follows (R. 59):

"From the time the pipe left the manufacturer in California until the pipe arrived at the right-of-way, the pipe was at all times under the care and supervision of the aforementioned common carrier, either railroad or the plaintiff."

These are the actual facts as stipulated by the parties, and for appellee to state that Tennessee Gas Transmission Company "accepted" the pipe at the end of the railroad portion and then "turned" the pipe over to appellant is simply a misstatement of the facts.

The shipper, Tennessee Gas Transmission Company, simply made notes as to any damage or loss that had been sustained on the railroad portion of the journey. The railroad turned the pipe over to appellant to complete the interstate journey which had been contemplated and intended from the very beginning. There was no interruption whatsoever of the interstate transportation. Appellant "would take possession of the pipe while it was still on the railroad cars."

Appellee further makes the point that the stipulation of facts did not refer to the Carmack Amendment to the Interstate Commerce Act. We do not believe that it is customary or proper to stipulate as to the existence of

a statute. The stipulation was limited to the "facts" and then the law is applied to the facts. In this case, the extent and the purpose of the inspection by Tennessee Gas Transmission Company was stipulated, so that there would be no question in this regard. The reason the inspection was necessary was because the provisions of the Carmack Amendment were not available to the parties, there being separate bills of lading. Under these circumstances, it was necessary, or certainly advisable, that the shipper be in a position to tell which carrier had possession of the pipe when a loss or shortage occurred. This is simply good business practice. Interchanging carriers themselves attempt to make this check by notations on the waybills, even where there is a through bill of lading. This was simply an additional precaution taken by the shipper and had no effect whatsoever upon the interstate character of the movement. The shipper simply did not want to become involved in an argument as to which carrier was responsible for any damage to or loss of the pipe. In order to avoid any such argument, it simply inspected the pipe as it was delivered by the railroad to the trucking line. The purpose of this inspection was agreed upon by the parties and any conclusion other than that as stipulated is contradictory to the actual facts as stipulated.

ARGUMENT.

The only ground assigned by appellee in his motion to dismiss or affirm is that "a substantial federal question is not presented in this case." Accordingly, this is the only point that we will discuss in this reply brief.

The first position urged by appellee in his argument is that "a federal question does not arise when a state court holds that a statute applies only to domestic transportation." He concedes that this Court has a right to

determine for itself what is interstate commerce, but then concludes that this Court "is bound by the construction which a state court places on its own statutes."

Certainly, there is no merit in this position. If it be assumed that the Mississippi Court has held that the tax applies only to intrastate commerce, a federal question at once emerges, to-wit: The question of whether the transportation in question is in intrastate or interstate commerce. This Court will decide that question for itself from the facts in the record.

In *Hooven & Allison Company* v. *Evatt*, 324 U. S. 652, 659, 89 L. Ed. 1252, 1260, the Court said:

> "In all cases coming to us from a state court, we pay great deference to its determination of fact. But when the existence of an asserted Federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained."

It is fundamental that the determination of what constitutes interstate commerce is a matter of federal law, and the decisions of this Court are conclusive on that question. This Court will determine for itself the necessary operation and effect of a state law which is challenged on the ground that it violates the Commerce Clause. Indeed, the typical and usual case of federal jurisdiction arises in situations where a state court holds that a particular transaction is intrastate rather than interstate, and that on such basis a state statute may be applied and enforced. *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265, 270, 66 L. Ed. 227, 231; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239; *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277, 66 L. Ed. 234.

The second position urged by appellee in his argument is that "the incidence of appellant's tax was intrastate transportation." Here we have appellee stating again that the tax here sought to be collected is imposed upon the business itself. It is his position that this business is intrastate business. We have no argument with some of the abstract statements of law presented by appellee; however, they have no application to this case. The question here is whether the transportation sought to be taxed was in intrastate or interstate commerce. We will not again repeat the facts as agreed upon by the parties. These facts are clear and undisputed. The "essential character" of the movement is stipulated. The only differences between the shipment in this case and a shipment by one carrier under one through bill of lading are as follows: (1) There was no through bill of lading; the shipment being moved partly by rail and partly by trucks; and (2) the shipper inspected the property when it was delivered by one carrier to the next carrier.

We have previously pointed out that the parties agree as to the purpose of the inspection by the shipper, and certainly a simple inspection for the purpose of being in a position to determine where any loss or damage occurred is not an interruption of an interstate movement. This leaves us with the sole and only difference being that two bills of lading were issued instead of one. *As we stated in our Jurisdictional Statement, the effect of the Mississippi Supreme Court decision is to make the issuance of two bills of lading absolutely controlling even though the intent is clear.* We submit again that this is the only conclusion that can be drawn from the opinion of the Mississippi Supreme Court. Appellee, in his brief, has not taken issue with this statement even though he does discuss the "inspection" by the shipper. He continues to refer to this "inspection" as an "acceptance" by the shipper.

This is at variance with the agreed statement of facts—merely making notations as to damage done or loss of property, while the property remains in the care and custody of common carriers, certainly does not constitute an acceptance of the shipment by the shipper so as to change the character of the shipment from interstate to intrastate.

We believe that one quotation from the case of *Baltimore and Ohio Southwestern Railroad Co.* v. *Settle*, 260 U. S. 166, 171, 67 L. Ed. 189, 192, is sufficient authority that the entire movement was in interstate commerce and also disposes of this point. In that case, this Court stated as follows:

> "Under these circumstances, the intention, as it was carried out, determined, as matter of law, the essential nature of the movement; and hence, that the movement through to Madisonville was an interstate shipment. For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence or absence of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic."

Another case directly in point is *United States* v. *Erie Railroad Co.*, 280 U. S. 98, 74 L. Ed. 187.

The inspection for the purpose of ascertaining loss or damage did not break the continuity of the interstate journey. This inspection was a mere incident to the journey, made necessary by the change in the mode of transportation by which the pipe was carried from a place in

California to a place agreed upon in Mississippi. *Hughes Brothers Timber Co.* v. *Minnesota*, 272 U. S. 469, 475, 71 L. Ed. 359, 362.

It is certainly well-settled by the many decisions of this Court that the activity of appellant in transporting this pipe was an integral part of the interstate movement and cannot be separated therefrom. *Puget Sound Stevedoring Co.* v. *State Tax Commission*, 302 U. S. 90, 82 L. Ed. 68, 58 S. Ct. 72; *Baltimore and Ohio Southwestern Railroad Co.* v. *Burtch*, 263 U. S. 540, 68 L. Ed. 433, 44 S. Ct. 165; *Minnesota* v. *Blasius*, 290 U. S. 1, 9, 78 L. Ed. 131, 136; *Champlain Realty Co.* v. *Brattleboro*, 260 U. S. 366, 67 L. Ed. 309; *Hughes Brothers Timber Co.* v. *Minnesota*, 272 U. S. 469, 71 L. Ed. 359.

It is equally well-settled that an integral part of interstate commerce is not subject to state taxation for the privilege of engaging in such commerce within the state. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 98 L. Ed. 583; *Railway Express Agency* v. *Virginia*, 347 U. S. 359, 98 L. Ed. 757.

The third position urged by appellee in his argument is that "a state may tax gross proceeds of interstate commerce."

Here we have appellee taking the position that interstate commerce must pay its way, and therefore a state can levy a tax on the privilege of engaging in this commerce. Appellee concedes that the tax here sought to be imposed is on the privilege of engaging in the commerce. Yet, he still contends that the tax can be levied and collected by the State of Mississippi on purely and exclusively interstate commerce. The question here is not whether interstate commerce must be made to pay its way, but whether this particular tax can be levied and collected by the State of Mississippi from a carrier doing wholly and exclusively

interstate commerce in the State of Mississippi. The Supreme Court of the State of Mississippi held that the tax could be levied and collected in this instance because it was not shown that the interstate carrier paid other or different taxes to the State of Mississippi. It is interesting to note that appellee has not even advanced this argument in his motion. This holding by the Mississippi Supreme Court is quite clear, and, as pointed out in our Jurisdictional Statement, would establish a new principle of constitutional law. Certainly, the establishment of such a new, novel and different principle of constitutional law raises a substantial question. It was pointed out in our Jurisdictional Statement that if the opinion of the Mississippi Supreme Court is left standing, "then privilege taxes can be imposed directly upon the privilege of engaging in interstate commerce by the various states, unless it is shown that the states are paid other taxes." Appellee has not taken issue with our statement. If left standing, the opinion of the Mississippi Supreme Court will have created a way to circumvent and make almost meaningless the Commerce Clause of the Federal Constitution. If this does not present a substantial question, then we can think of no case that could present a substantial question.

It would unduly lengthen this reply for us to comment specifically on each case cited by appellee. We believe it to be sufficient to state that not one of them is in point from a factual standpoint or authoritative from a legal standpoint insofar as the issue now being presented to this Court is concerned. There is no question of apportionment here. There is no question of interstate commerce paying its way involved in this case. There is no question of taxation in connection with local protection involved in this case. The simple question here involved is whether a state can levy a privilege tax upon the privilege of doing a purely and exclusively interstate business.

The decisions of this Court beginning with *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 95 L. Ed. 573, and including *Memphis Steam Laundry Cleaner, Inc.*, v. *Stone*, 342 U. S. 389, 96 L. Ed. 436, 72 S. Ct. 424; *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396; and *Railway Express Agency* v. *Virginia*, 347 U. S. 359, 98 L. Ed. 757, 74 S. Ct. 558, control the present case, and dispose of every contention advanced by appellee. It is significant that appellee makes no effort to discuss and distinguish these decisions.

It is submitted that the questions involved in this case are of public importance and so substantial as to require plenary consideration by this Court.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 385.

DUNN BROS., INC., APPELLANT,

VS.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION, REVIVED AS ALEX McKEIGNEY, CHAIRMAN OF STATE TAX COMMISSION, APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

PETITION FOR REHEARING.

Appellant prays that this Court grant rehearing of its decision of November 7, 1955, dismissing the appeal in this cause for want of a substantial federal question, and that upon such rehearing this Court note probable jurisdiction in this cause and set the case for hearing on its merits.

REASONS FOR GRANTING REHEARING.

This appeal presents the following questions:

1. Whether the Commerce Clause is infringed by the Mississippi Sales Tax Law which, as applied to appellant, imposed a privilege tax upon the privilege of carrying on that portion of an interstate motor carrier's business which consisted of receiving certain pipe from railroads at various points in Mississippi, which pipe had been shipped from California, and continuing the transportation of such pipe to other points in Mississippi on the right-of-way of an interstate pipe line, where the stipulated facts showed that it was the continuing intent of the shipper at all times that said pipe be transported by common carrier from the point of manufacture in California to the pipe line right-of-way within Mississippi; that the railheads were never intended to be the ultimate destination of the pipe; and the pipe was so transported from California to the rights-of-way in Mississippi by the most direct route available; and the stipulated facts further show that from the time the pipe left the manufacturer in California until the pipe arrived at the right-of-way in Mississippi, the pipe was at all times under the care and supervision of said common carriers, either railroad or appellant?

2. Whether the operations of the motor carrier described above were exclusively in interstate commerce?

3. If the operations of said motor carrier were exclusively in interstate commerce, whether the State of Mississippi may lawfully impose a privilege tax as a condition precedent to the carrying on of such activities in interstate commerce?

The present case is a test case which affects the rights of all other motor carriers in this nation which perform services similar to those performed by appellant. The decision in this case affects the operations of such carriers in practically every one of the 48 states. In view of the fact that there are several questions involved in this case, and the fact that the appeal was dismissed without any opinion, it is impossible for appellant and others similarly situated to know the basis of the Court's decision and its effect on their rights in other states.

It is impossible to determine whether the Court has determined that the operation in question is intrastate commerce and therefore subject to this privilege tax, or whether the Court has held that the operation in question is interstate commerce, but is nevertheless subject to the tax.

It is impossible to determine:

First: Whether this Court holds that the transportation in question is not interstate commerce, because:

A. The fact that this transportation is wholly within one state makes it intrastate commerce, or because

B. The use of two bills of lading and the change of the mode of transportation from rail to truck renders the motor carrier movement intrastate commerce; or because

C. The inspection at the end of the rail journey terminated the interstate transportation so as to render the motor carrier movement intrastate commerce.

Or:

> Second: Whether the Court has held that even though the activities of appellant were solely and exclusively in interstate commerce, nevertheless appellant must pay the privilege tax as a recompense for the benefits and protection which the State of Mississippi afforded to appellant while it was engaged in these activities.

In order that appellant and others similarly situated may be informed of their rights in others of the forty-eight states in which they operate, it is essential that the basis of the holding be made clear. For example, if the sole basis of the holding is that the inspection at the end of the railroad portion of the journey terminated the interstate commerce, appellant and its customers might well dispense with such inspection in the future.

In any event, regardless of what the basis of the dismissal of this appeal may have been, it is respectfully submitted that this Court erred in such dismissal. We can only feel that we must have failed to make clear to the Court the precise nature of the transportation involved, and the precise nature and effect of the tax sought to be imposed.

It is submitted that whatever the basis of the dismissal, the decision is erroneous and violates legal principles firmly established by the decisions of this Court.

I.

If this Court holds that the transaction was not in interstate commerce because the truck portion of the journey took place wholly within a single state, then such holding is in direct conflict with decisions of this Court which have never been questioned. It is established law that the fact that a movement takes place wholly within a single state does not necessarily make such movement intrastate commerce, and that where the commodity being transported is destined for or is received from places outside the state, then the movement within the state is an interstate movement where the essential character of the entire movement is interstate.

The Daniel Ball, 10 Wall., 77 U. S. 557, 19 L. Ed. 999.

Norfolk & Western R. Co. v. *Pennsylvania*, 136 U. S. 114, 118, 119, 34 L. Ed. 394, 397.

Baer Bros. Mercantile Co. v. *Denver & Rio Grande R. R. Co.*, 233 U. S. 479, 490, 58 L. Ed. 1055, 1062.

Annotation, 74 L. Ed. 192.

It is undisputed in the present case that all of the activities of appellant were a part of an actual and intended interstate movement which had been arranged in advance by the shipper in the course of carrying out a continuing intention that the commodity in question be transported from California to its ultimate destination on the pipe line right-of-way in the State of Mississippi. Under these circumstances, the intention, as it was carried out, determined, as a matter of law, the essential nature of this movement; and hence, that this entire shipment, including the truck portion of the journey, was an interstate shipment.

Baltimore & Ohio S. W. R. Co. v. *Settle*, 260 U. S. 166, 171, 67 L. Ed. 189, 192.

United States v. *Erie Railroad Company*, 280 U. S. 98, 74 L. Ed. 187.

If this Court has held that the movement in question is not in interstate commerce because wholly within Mississippi, then the holding of this Court is in conflict with an unbroken line of decisions of the Interstate Commerce Commission and the lower Federal Courts. We recognize that the decisions of the Interstate Commerce Commission are in no sense binding on this Court. The Interstate Commerce Commission, however, is a special body whose sole purpose and duty is to regulate interstate commerce. Certainly the decisions of such a body in cases involving *identical* factual situations should be persuasive. But we cite these decisions of the Interstate Commerce Commission, not so much as persuasive authority, but as illustrating the fact that the questions involved in this case, which the Court has dismissed as insubstantial, are in fact very substantial and of vital importance to the entire transportation industry. If this Court holds that a movement of the nature herein involved is not in interstate commerce, then all of the decisions of the Interstate Commerce Commission dealing with such movements are in error. Yet, because of the method of disposition of this appeal, there is no way of knowing whether the Court has in fact held that the movement in question did or did not constitute interstate commerce.

The Interstate Commerce Commission has held with reference to the identical factual situation involved in the present case, with the appellant itself being involved, that the operations of appellant are in interstate commerce. In *Dunn Contract Carrier Application*, 28 M. C. C. 476, the Interstate Commerce Commission said:

> "Protestant rail carriers contend that applicant's operation within one State from rail car to job site is

not a movement in interstate or foreign commerce. The facts also raise the issue as to whether this transportation along the private right-of-way is subject to our regulation. *The pipe-line company purchases its right-of-way and knows precisely where the new pipe is destined when it places its order with eastern mills. It then designates each rail delivery point to which the pipe is to be shipped, with the amount to be delivered, which points are selected so as to be nearest the site of construction in order to reduce the truck haul to a minimum. Under these circumstances, we conclude that the movement by motor vehicle of new pipe from rail points to points of use is a continuing interstate movement and that the portion of the truck haul which is conducted over private right-of-way as well as that over the public highways is subject to our jurisdiction under the act"* (Emphasis added).

Other decisions of the Interstate Commerce Commission which are to the same effect are:

Cox, Common Carrier Application, 26 M. C. C. 502 (1940).

Walter M. Chambers—Extension—Baxterville, Mississippi, Oil Field, 8 F. C. C. 32, 125.

William F. Crossett—Extension, 8 F. C. C. 31, 970.

Petroleum Carrier Corporation, Common Carrier Application, 48 M. C. C. 719.

Bisceglia Contract Carrier Application, 34 M. C. C. 233.

Numerous other decisions to the same effect could be cited, but the foregoing will illustrate the seriousness of the problem created if this Court means by its dismissal that the movement involved in the present case was not in interstate commerce.

As stated, motor carriers engaged in the identical type of operation involved in the present case operate in every

one of the forty-eight states. If this Court holds that such operations are not in interstate commerce, the interstate status of such carriers within each state will be eliminated, and each state may assess a privilege tax on such operations.

If by the dismissal of the appeal this Court means to hold that the use of two bills of lading and the change of the mode of transportation from rail to truck renders the motor carrier movement intrastate commerce, then its decision is equally erroneous.

If the railroad had transported the pipe to its rail terminals by rail and had then transported it to the right-of-way by its own trucks, all under one bill of lading, certainly no one would deny that the truck portion of the journey was in interstate commerce. The absence of a through bill of lading, and the fact that two carriers are used instead of one does not change the nature of the commerce.

Baltimore & Ohio S. W. R. Co. v. *Settle*, 260 U. S. 166, 171, 67 L. Ed. 189, 192.

United States v. *Erie Railroad Company*, 280 U. S. 98, 74 L. Ed. 187.

If by the dismissal of the appeal the Court does not mean to hold that the movement in question was intrastate because it took place wholly within the bounds of one state, or because of the change in the mode of transportation, but, on the other hand, means to hold that the interstate journey terminated because of the inspection at the railhead, then again we say that the decision of this Court is contrary to all established precedents on the subject.

This inspection did not constitute an acceptance of the commodity by the shipper-consignee, but was solely for the purpose of determining whether or not damage or loss had

occurred in transit during the railroad portion of the journey. This inspection was a mere incident to the journey, made necessary by the change in the mode of transportation (*i. e.* from rail to truck) by which the pipe was carried from its origin in California to its ultimate destination along the pipe line right-of-way in Mississippi.

Hughes Bros. Timber Co. v. *Minnesota*, 272 U. S. 469, 475, 71 L. Ed. 359, 362.

Incidental dealings with a moving commodity do not break the continuity of interstate transportation. *State Tax Commission* v. *Interstate Natural Gas Company*, 284 U. S. 41, 76 L. Ed. 156, 157.

An interstate movement which has once begun is regarded as continuing despite a temporary interruption due to necessities of the journey, or for the purpose of safety and convenience in the course of the movement. *Minnesota* v. *Blasius*, 290 U. S. 1, 78 L. Ed. 131; *Champlain Realty Co.* v. *Brattleboro*, 260 U. S. 366, 67 L. Ed. 309.

There can be no question but that the interstate movement of this pipe had begun when the pipe was delivered to the railroad in California for shipment to its ultimate destination on the right-of-way in the State of Mississippi. Once this interstate journey had begun, it continued until the goods reached their final destination and became an inseparable part of the mass of property within the State of Mississippi. The mere changing of the mode of transportation from rail to truck did not change the essential interstate character of the movement.

The present case does not involve any so-called casual or incidental movement of transportation wholly within a single state immediately preceding or following interstate transportation. It is undisputed in the present case that before the shipper turned the pipe over to the railroad in Cali-

fornia, the shipper had made the necessary special arrangements with appellant to continue the transportation of this pipe from the railheads in Mississippi to the ultimate destination, which was the right-of-way in Mississippi. From the outset, it was intended that the pipe be transported from California to the right-of-way in Mississippi by the most direct route available. This intention persisted and continued, and was actually carried out. Under these circumstances, the truck portion of the journey must be viewed in its relation to the entire trip, rather than in isolation. Thus viewed, the transportation by appellant was an integral and constituent part of the interstate movement and cannot be separated therefrom.

It is respectfully submitted, therefore, that if this Court, by the dismissal of the appeal, has held that the movement in question was not in interstate commerce, such holding is erroneous and should be reconsidered.

II.

If, on the other hand, by the dismissal of the appeal, this Court means to hold that the activities of appellant were solely and exclusively in interstate commerce, but that nevertheless, appellant must pay the privilege tax, then again we say that the decision of this Court is erroneous and should be reconsidered.

The tax in question is admittedly a privilege tax, and one which is imposed as a condition precedent to engaging in business in Mississippi, and in addition to all other licenses and taxes levied by law. *Section 10126, Mississippi Code of 1942.* The Legislature of Mississippi has designated this tax as a privilege tax. *Section 10105, Mississippi Code of 1942.* The present tax in fact and in effect is just what the Mississippi Legislature said it was—a privilege

tax, and therefore one that cannot be applied to an exclusively interstate business.

The case of *Spector Motor Service, Inc.*, v. *O'Connor*, 340 U. S. 602, 95 L. Ed. 573, specifically held that the Commerce Clause prohibits a state from imposing a direct privilege tax upon a corporation engaged exclusively in the interstate transportation of freight. The Spector case further held that this is true even though the tax is nondiscriminatory and is apportioned to business done within a state.

If the dismissal of this appeal means that this Court holds that the operations in question are interstate but are nevertheless subject to privilege taxation by the state, then necessarily the decision in the present case is contrary to the decision in the Spector case.

If by the dismissal of this appeal this Court means to hold that the operations in question are interstate commerce, but constitute such a "local activity" that the privilege tax can be imposed, then the dismissal of this appeal is contrary to the decision in *Michigan-Wisconsin Pipe Line Company* v. *Calvert*, 347 U. S. 157; 98 L. Ed 583, 74 S. Ct. 326. This case clearly holds that a privilege tax on a local activity related to interstate commerce can be upheld only in cases where there is a genuine local activity *distinctly separate and apart* from the interstate commerce. In the preceding discussion we undertook to demonstrate that the movement within Mississippi was not distinctly separate and apart from the interstate commerce.

We have heretofore pointed out that the movement by appellant was an integral part of an actual interstate movement, which had been arranged in advance by the shipper in the course of carrying out a continuing inten-

tion that the commodity in question be transported from California to its ultimate destination in Mississippi. The transportation by appellant, under these circumstances, must be viewed in its relation to the entire trip, and thus viewed it was an integral and constituent part of the interstate movement. It is respectfully submitted that the movement involved here was an integral part of the interstate process which cannot realistically be separated from it. Certainly the taking possession of a commodity by a *carrier* for immediate continuation of interstate transportation is obviously and necessarily a part of the interstate transportation itself. *Puget Sound Stevedoring Co.* v. *State Tax Commission,* 302 U. S. 90, 82 L. Ed. 68.

The transportation of this pipe from California to its ultimate destination on the right-of-way in Mississippi in accordance with the intention of the shipper was an entire and integral economic process. The truck portion of the interstate journey was a constituent and integral part of such interstate process. This being true, it cannot be separated and subjected to the privilege tax here involved.

Further authority for this proposition is found in the case of *Railway Express Agency* v. *Virginia,* 347 U. S. 359, 98 L. Ed. 757, 74 S. Ct. 558, in which the Court held specifically that the local activities of "originating the interstate movement, which requires local pickup of the parcels; terminating the movement, which requires delivery, and movement through the state" were integral parts of the interstate commerce, and as such, they were not local activities upon which state privilege taxes could be based.

There is one proposition upon which the Court may have based the dismissal of the appeal which was not fully discussed in our Jurisdictional Statement and our Brief in Opposition to the Motion to Dismiss. We re-

frained from discussing this point because we thought it unnecessary in view of the recent decisions of this Court. We refer to the argument which frequently has been urged in the past that a state tax on interstate commerce should be upheld if it met the so-called "multiple burden test." That is to say, if there was no possibility of the tax being duplicated by another state, the tax should be upheld. This argument ignored the basic test of whether there is a direct burden on interstate commerce. This so-called "multiple burden test" was completely vitiated by the decision in *Michigan-Wisconsin Pipe Line Company* v. *Calvert*, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 326.

The opinion by Justice Clark in that case points out that a state tax on interstate commerce is invalid if it burdens such commerce *either* (1) directly, *or* (2) by the possibility of multiple taxation resulting from other taxes of the same sort being imposed by other states. In the *Michigan-Wisconsin* case, the Court first very carefully invalidated the tax there involved because the activity sought to be taxed was "not so separate and distinct from interstate transportation" as to support the tax, and only then added, in one final paragraph, that the tax was *also* objectionable because it would "promote a multiple burden upon interstate commerce."

In commenting on this case in an article in *41 A. B. A. Journal, July, 1955, page 603*, James M. Marsh, former law clerk to Mr. Justice Jackson, states:

> "This again serves to illustrate that the multiple burden test is not so much a device for *validating* taxes, as it is an *additional hurdle* which challenged state levies must meet" (Emphasis by the author).

We say, therefore, that if by the dismissal of this appeal this Court means to hold that, even though the trans-

action is in interstate commerce, nevertheless it may be subjected to a direct privilege tax, then the effect thereof is to undermine one of the cornerstones of our constitutional law, which is that the federal privilege of carrying on exclusively interstate commerce cannot be subjected to direct privilege taxation by a state.

Nor does the fact that some benefits and protection may have been afforded to appellant by the State of Mississippi justify the imposition of this tax on a purely interstate activity. The benefits and protection afforded by a state to an interstate carrier are relevant only when the question of due process alone is involved. Benefits and protections afforded by a state are not material in determining the validity of a specific privilege tax under the Commerce Clause. *Michigan-Wisconsin Pipe Line Company* v. *Calvert*, 347 U. S. 157, 163, 98 L. Ed. 583, 590, 74 S. Ct. 326.

CONCLUSION.

For the reasons set forth above and in the Jurisdictional Statement and the Brief in Opposition to the Motion to Dismiss, it is respectfully urged that rehearing be granted, and that upon such rehearing probable jurisdiction be noted and this case set for oral argument.

Respectfully submitted,

CERTIFICATE.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

.....

Counsel.

CERTIFICATE OF SERVICE.

I, C. B. Snow, attorney of record for appellant, hereby certify that I have this day delivered to Honorable John E. Stone, State Office Building, Jackson, Mississippi, attorney of record for appellee, a true and correct copy of the above petition.

This the ..... day of November, 1955.

.....

C. B. Snow.

No. 385. DUNN BROS., INC. *v.* STONE, CHAIRMAN, STATE TAX COMMISSION. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *C. B. Snow, Junior O'Mara* and *George H. Butler* for appellant. *John E. Stone* for appellee. Reported below: — Miss. —, —, 80 So. 2d 802, 81 So. 2d 712.

No. 394. BERRYMAN *v.* OKLAHOMA. Appeal from the